No. 03-358

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 02-70986, 02-71249

PUBLIC CITIZEN; BROTHERHOOD OF TEAMSTERS, AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION; CALIFORNIA TRUCKING ASSOCIATION; ENVIRONMENTAL LAW FOUNDATION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL; PLANNING AND CONSERVATION LEAGUE, PETITIONERS-INTERVENORS

v.

DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; NICHOLAS R. WALSH, RESPONDENTS

INTERNATIONAL BROTHERHOOD OF TEAMSTERS; BROTHERHOOD OF TEAMSTERS, AUTO AND TRUCK DRIVERS, LOCAL 70; CALIFORNIA LABOR FEDERATION; CALIFORNIA TRUCKING ASSOCIATION; ENVIRONMENTAL LAW FOUNDATION; PUBLIC CITIZEN, PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL; PLANNING AND CONSERVATION LEAGUE, PETITIONERS-INTERVENORS

v.

U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; JOSEPH M. CLAPP; NICHOLAS R. WALSH, RESPONDENTS

Argued and submitted: Oct. 8, 2002
[Filed: Jan. 16, 2003]

Before: D.W. NELSON, HAWKINS and WARDLAW, Circuit Judges

OPINION

WARDLAW, Circuit Judge.

Petitioners[1] challenge the Department of Transportation's failure to conduct the requisite environmental analyses prior to promulgating three regulations, the combined effect of which will permit Mexico-domiciled motor carriers to operate within the United States beyond the current limited border zones, thus fulfilling the United States' obligations under the North American Free Trade Agreement. Upon completion of a preliminary Environmental Assessment for two of the three regulations, the Department of Transportation decided that there was no need for further environmental analysis. Petitioners claim that the Department of Transportation's failure to prepare an in-depth Environmental Impact Statement for all three regulations violates the National Environmental Policy Act of 1969, and that its further failure to conduct a "conformity determination" to ensure that the regulations do not disrupt applicable State Implementation Plans violates the Clean Air Act. Although we agree with the impor-

[1] The petitioners in this case are Public Citizen; the Brotherhood of Teamsters, Auto and Truck Drivers, Local 70; the California Labor Federation; the California Trucking Association; the Environmental Law Foundation; and the International Brotherhood of Teamsters. We will refer to them (as well as the Petitioners Intervenors, discussed below) collectively, as "Petitioners" unless otherwise noted.

tance of the United States' compliance with its treaty obligations with its southern neighbor, Mexico, such compliance cannot come at the cost of violating United States law. Because we conclude that the Department of Transportation acted without regard to well-established United States environmental laws, we grant the petitions.

I. LEGAL BACKGROUND

Before proceeding to the regulations at issue, it is useful to examine the legal and regulatory context in which they were promulgated. These regulations can only be considered against the historical backdrop of the National Environmental Policy Act of 1969, Pub.L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370f) ("NEPA"), the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), and the North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1-9), 32 I.L.M. 605 (chs.10-22) (1993) ("NAFTA").

A. National Environmental Policy Act of 1969

On January 1, 1970, President Richard Nixon signed NEPA into law. Although various state and federal environmental measures had been in place for decades, this statute marked the first nationwide comprehensive approach to regulating the interaction between Americans and their environment. Prompted by a series of environmental crises in the late 1960s, NEPA's sweeping reach reflected Congress's conviction that "our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces." S. Rep. No. 91-296, at 4 (1969).

Such broad policy creation was also reflected in the statute's first section, containing the congressional declaration of purpose:

> The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321. To accomplish these ends, Congress imposed extensive procedural requirements on government action affecting the environment. Paramount among these were the requirements that all federal agencies shall, "to the fullest extent possible":

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality

> of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(2). Congress further directed that, again "to the fullest extent possible," "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter." *Id.* § 4332(1). This unequivocal command has guided the United States' environmental policy for more than thirty years, and pervades every aspect of government decisionmaking.

B. Clean Air Act

Federal air quality legislation dates back to at least the mid-1950s, and the CAA itself to 1963, Pub.L. No. 88-206, 77 Stat. 393, but it was the substantial amendment in 1970, Pub.L. No. 91-604, 84 Stat. 1713, that gave the Act its modern, far-reaching scope. The Act was amended again to further broaden its reach in 1977, Pub.L. No. 95-95, 91 Stat. 749, and in 1990, Pub.L. No.

101-549, 104 Stat. 2399. Before the 1970 Amendments, there existed no federal air pollution standards, nor mandatory enforcement mechanisms; federal officials could only encourage states to develop air-quality enforcement programs. All this was dramatically altered by the 1970 Amendments, which mandated national air quality standards and deadlines for their attainment. Pub.L. No. 91-604, § 4, 84 Stat. at 1678-89. These amendments also created an innovative federal-state partnership structure whereby states were to develop individual "implementation plans" to attain compliance with federal standards, and the newly created Environmental Protection Agency ("EPA") was charged with evaluating, overseeing, and enforcing state compliance with these plans. *Id.* The 1970 Amendments specifically addressed for the first time hazardous pollutants and automobile exhausts, bringing these "mobile sources" within the scope of the EPA's authority. *Id.* §§ 6-9, 84 Stat. at 1690-700.

The 1977 Amendments added an important procedural safeguard: they forbade the federal government and its agencies from "engag[ing] in, support[ing] in any way or provid[ing] financial assistance for, licens[ing] or permit [ting], or approv[ing], any activity which does not conform to [an approved state] implementation plan." 42 U.S.C. § 7506(c)(1). The Act defined "conformity" broadly to include a restriction on such things as "increas[ing] the frequency and severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area." *Id.* § 7506(c)(1)(B). This prevented the federal government from hindering states' abilities to comply with the Act's requirements. Finally, the 1990 Amendments vastly increased the list of regulated

pollutants, as well as the EPA's civil and criminal enforcement capabilities.

C. North American Free Trade Agreement

On December 17, 1992, President William J. Clinton signed NAFTA, establishing a free-trade zone encompassing the United States, Canada, and Mexico. Upon submission to Congress, it was enacted into law as the North American Free Trade Agreement Implementation Act, Pub.L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301-3473) (effective Jan. 1, 1994).

NAFTA aimed to "CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation" while "STRENGTHEN[ING] the development and enforcement of environmental laws and regulations." *Id.* pmbl., 32 I.L.M. at 297. Indeed, environmental concerns dominated the debate over NAFTA in the United States. President Clinton waited for over a year to submit the agreement to Congress while the parties negotiated a side agreement, the North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480. The NAFTA agreement itself explicitly permits member states to adopt or maintain

> standards-related measures, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers . . . includ[ing] those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable

> requirements of those measures or to complete the Party's approval procedures.

NAFTA art. 904(1), 32 I.L.M. at 387.

The treaty as enacted into United States law specifically determined that in the case of a conflict between the treaty and federal law, federal law would prevail. 19 U.S.C. § 3312(a)(1) ("No provision of the Agreement . . . which is inconsistent with any law of the United States shall have effect."). Congress also made clear that NAFTA cannot be construed "to amend or modify any law of the United States, including any law regarding . . . the protection of human, animal, or plant life or health [or] the protection of the environment." *Id.* § 3312(a)(2).

II. PROCEDURAL HISTORY

Before us are three regulations, all promulgated on March 19, 2002 by the Federal Motor Carrier Safety Administration ("FMCSA"), an agency within the Department of Transportation (collectively "DOT"). These regulations will permit complying Mexico-domiciled trucks to operate in the United States beyond specified border zones. They are: (1) Application by Certain Mexico Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States Mexico Border, 67 Fed. Reg. 12,702 (Mar. 19, 2002) ("Application Rule"); (2) Safety Monitoring System and Compliance Initiative for Mexico Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12,758 (Mar. 19, 2002) ("Safety Rule"); and (3) Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, 67 Fed. Reg. 12,776 (Mar. 19, 2002) ("Certification Rule"). Under current law, such vehicles are allowed only in so-

called "border zones"—specially designated areas near the United States–Mexico border. Application Rule, 67 Fed. Reg. at 12,702. The regulations were issued in compliance with a rider to the 2002 Appropriations Act for DOT, which conditioned funding for permitting Mexican truck traffic into the United States on DOT's issuance of appropriate safety and inspection rules. *See* Department of Transportation and Related Agencies Appropriations Act, 2002, § 350, Pub.L. No. 107-87, 115 Stat. 833, 864 (2001) ("Appropriations Act"). Petitioners assert that DOT failed to examine adequately the environmental consequences of these regulations, as required by NEPA and CAA.

Foreign trucks are permitted to enter the United States only if they are authorized to do so. *See generally* 49 U.S.C. §§ 13501-13541, 13901-13908; 49 C.F.R. § 365.101-.511. DOT is generally required to grant such permission to any carrier that is "willing and able to comply with" certain statutes and regulations. 49 U.S.C. § 13902(a)(1). In 1982, however, Congress enacted the Bus Regulatory Reform Act of 1982, which imposed a two-year moratorium on the entry of motor carriers domiciled in a "contiguous foreign country," Pub.L. No. 97-261, § 6(g), 96 Stat. 1102, 1107-08, such as Mexico. This moratorium was renewable for subsequent two-year intervals by the President "in the national interest." *Id.*, 96 Stat. at 1108. The moratorium remained in place, through a series of presidential orders, until September 19, 1996.[2]

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[2] *See* 60 Fed. Reg. 12,393 (Mar. 2, 1995); 57 Fed. Reg. 44,647 (Sept. 25, 1992); 55 Fed. Reg. 38,657 (Sept. 17, 1990); 53 Fed. Reg. 36,430 (Sept. 15, 1988); 51 Fed. Reg. 34,079 (Sept. 23, 1986); and 49 Fed. Reg. 35,001 (Aug. 30, 1984).

Before the last two-year extension expired, the ICC Termination Act of 1995 was signed into law, causing all "existing restrictions on operations of motor carriers . . . domiciled in any contiguous foreign country . . . pursuant to section 6 of the Bus Regulatory Reform Act of 1982" to remain in effect unless and until the President expressly rescinded them for a statutorily acceptable reason, including "obligations of the United States under a trade agreement." 49 U.S.C. § 13902(c).

On February 6, 2001, a specially convened treaty arbitral panel determined that the United States' continued refusal to permit the entry of Mexican trucks beyond the restricted border zones violated NAFTA. Thereafter, as recited in the EA prepared by DOT, President George W. Bush "announced his intent to comply [with this ruling] by modifying the moratorium, pursuant to his statutory authority, once FMCSA [was] ready to issue . . . regulations governing Mexico-domiciled [trucks] seeking United States operating authority."

After the NAFTA arbitral panel issued its opinion, DOT published Notices of Rulemaking for the Application and Safety Rules on May 3, 2001. *See* 66 Fed. Reg. 22,371 (May 3, 2001) (Application Rule); 66 Fed. Reg. 22,415 (May 3, 2001) (Safety Rule). Meanwhile, in 1999, Congress had enacted the Motor Carrier Safety Improvement Act, mandating that DOT "complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors . . . to conduct safety inspection audits and reviews." 49 U.S.C. § 31148(a). The FMCSA was in the process of preparing these rules in 2001.

On December 18, 2001, the 2002 DOT Appropriations Act was signed into law. Pub.L. No. 107-87, 115 Stat. at 833. Section 350 of that Act provides:

> (a) No funds limited or appropriated in this Act may be obligated or expended for the review or processing of an application by a Mexican motor carrier for authority to operate beyond [the border zone] until the Federal Motor Carrier Safety Administration [issues safety and auditor-certification regulations, and conducts safety studies that meet certain specified criteria].
>
> . . . .
>
> (c) No vehicles owned or leased by a Mexican motor carrier may be permitted to operate beyond [the border zone] under conditional or permanent operating authority granted by the Federal Motor Carrier Safety Administration until—
>
> (1) the Department of Transportation Inspector General conducts a comprehensive review of border operations . . . . [and]
>
> (2) [t]he Secretary of Transportation certifies in writing in a manner addressing the Inspector General's findings . . . that the opening of the border does not pose an unacceptable safety risk to the American public.

Id. § 350, 115 Stat. at 864-68 (codified at 49 U.S.C. § 13902 note).

DOT subsequently modified the Application, Safety, and Certification Rules to comply with the requirements of the Appropriations Act. Recognizing the need

to comply with the regulations implementing NEPA, DOT prepared a preliminary Environmental Assessment ("EA") for the Application and Safety Rules, evaluating their likely environmental impact. DOT determined that a full Environmental Impact Statement ("EIS") was not required, concluding that the proposed rules did not "significantly affect[ ] the quality of the human environment." 42 U.S.C. § 4332(2)(C). Thus, it issued a Finding of No Significant Impact ("FONSI") along with the EA on January 16, 2002. DOT did not prepare an EA for the Certification Rule, because it determined that this regulation fell into the categorical exclusions from the EA/EIS requirement in the NEPA regulations. As a result, DOT also did not include the Certification Rule in its FONSI. Nor did DOT prepare a CAA conformity determination for any of the regulations because it determined that certain categorical exceptions to the conformity-determination requirement applied to them.

All three regulations were published in the *Federal Register* as "Interim Final Rules" on March 19, 2002. The Application Rule updates the requirements for Mexican carriers applying to use United States roads, including the applicants' ability to comply with certain United States truck safety regulations. *See* Application Rule, 67 Fed. Reg. at 12,735-40. Furthermore, the application form requires the carriers to agree to undergo pre-authorization safety audits, provide proof of insurance, and submit to inspection every three months. *Id.* at 12,715. The Safety Rule extends "provisional" operating authority to Mexican carriers for the first eighteen months they are licensed to enter the United States, subjecting them to intensified inspection during that period. Safety Rule, 67 Fed. Reg. at 12,771-73.

Upon successful completion of this initial period, carriers become eligible to receive "permanent" operating authority, under which they remain subject to less intensive monitoring and inspection. *See id.* The Certification Rule establishes certification procedures for the requisite personnel to conduct safety and compliance inspections. Certification Rule, 67 Fed. Reg. at 12,779.

Petitioners filed a timely petition challenging the validity of the Application and Safety Rules on May 2, 2002 (No. 02-70986), and a timely petition challenging the validity of the Certification Rule on May 14, 2002 (No. 02-71249). Both petitions, alleging violations of the procedural requirements of NEPA and the CAA, were brought pursuant to the judicial review provision of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"). We have jurisdiction to review the petitions under 28 U.S.C. § 2342(3)(A), which provides for direct review in the court of appeals of certain administrative actions. We consolidated the petitions by an order dated May 22, 2002. On June 14, 2002, we permitted the Natural Resources Defense Council and the Planning and Conservation League to intervene on behalf of Petitioners.

The DOT Inspector General filed a report regarding his "comprehensive review of border operations" on June 25, 2002, and the Secretary of Transportation issued his written certification on November 20, 2002. As promised, following DOT's certification of its readiness to issue the regulations, President Bush modified the trucking moratorium (subsequent to oral argument) to permit Mexico-domiciled motor carriers to provide

cross-border services.[3] *See* Memorandum of November 27, 2002, 67 Fed. Reg. 71,795 (2002).[4] The moratorium remains in place now only as to Mexico-domiciled motor carrier services between points in the United States. *Id.*

III. STANDING

We must first address Petitioners' standing to sue. Even though standing was not an issue in the administrative proceedings, "federal courts are under an independent obligation to examine their own jurisdiction, and standing' is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed.2d 603 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed.2d 556 (1984)) (alteration in original). We need only find that one petitioner has standing to allow a case to proceed. *See, e.g., Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1331 (9th Cir. 1997) (White, Justice, by designation) (evaluation of the standing of a second plaintiff is "unnecessary to resolution of the case"); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L.Ed.2d 309 (1981) ("There are three groups of plaintiffs in this litigation. . . . Because we find [that

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[3] We ordered the parties to submit supplemental briefing addressing the effect of the President's order modifying the Mexican-domiciled motor carrier moratorium on the issues presented in this case. Simultaneous supplemental briefs were filed on December 13, 2002.

[4] President Bush had previously modified the moratorium, in a manner not affecting this case, by permitting United States-domiciled Mexican-owned or -controlled motor carriers to provide services within the United States. *See* Memorandum, 66 Fed. Reg. 30,799 (2001).

one of the groups] has standing, we do not consider the standing of the other plaintiffs."). Thus, at Petitioners' suggestion, we consider only the standing of Public Citizen.

We look first to Public Citizen's ability to satisfy the constitutional requirements for standing, then turn to the requirements for organizational and statutory standing under the APA.

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992)). We address these constitutional minima in turn.

A. Injury in Fact

"To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (quoting *Defenders of Wildlife*, 504 U.S. at 573 n. 8, 112 S. Ct. 2130). The "procedures in question" here require federal agencies to perform certain types of environmental analysis

before promulgating regulations. Public Citizen has adequately alleged that DOT failed to properly follow these procedures. "In NEPA cases, we have described [the] 'concrete interest' test as requiring a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Id.* (quoting *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 n. 5 (9th Cir. 1995)). The same inquiry is appropriate in a CAA case, such as this, where a federal agency has allegedly failed to conduct a conformity determination. That is, environmental petitioners must allege that they will suffer harm by virtue of their geographic proximity to the situs of the claimed pollution.

Public Citizen describes itself as an organization whose "members include residents who reside along the Mexican border area in the United States and will be negatively affected by increases in emissions" from Mexico-domiciled trucks if they are allowed into this country. This includes "2,567 . . . members [who] live in greater Los Angeles, 1,205 [who] live in the San Diego area, . . . [and] 1,094 [who] live in the greater Houston area." These are the geographic areas most likely to be affected by increased truck traffic from Mexico.

Public Citizen further alleges that its "members [who] live and work in [these] areas . . . that will be most affected by increased emissions from Mexico-domiciled trucks . . . will be exposed to such emissions, and as a result may suffer adverse health effects." An individual member of Public Citizen from Houston[5] has submitted a declaration informing us that

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[5] We note that, according to the U.S. Geological Survey's National Biological Information Infrastructure, Houston has sur-

he monitors smog levels due to diesel truck traffic via e-mail alerts and that he limits his family's outdoor recreational activity when such alerts occur out of concern for their health.

We have held that "evidence of a credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries to cognizable interests that may confer standing." *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001); *cf. Natural Res. Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 994 (9th Cir. 2000) (Plaintiffs alleged sufficient injury in fact when they testified that "they have derived recreational and aesthetic benefit from their use of the [affected area] . . . , but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like."). Cognizable "credible threat[s]" include " 'increased traffic, pollution, and noise,' " *Hall*, 266 F.3d at 976 n. 6 (quoting *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176 (3d Cir. 2000)), and "increased auto emissions," *id.* (citing *Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997)). This jurisprudence is consistent with the Supreme Court's rule that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183, 120 S. Ct. 693 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972)). Accordingly, Public Citizen's allegations and supporting evidence fall squarely within our rule, and satisfy the injury-in-fact requirement.

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passed Los Angeles as the most air-polluted city in the United States. *See* http://cswgcin.nbii.gov/urban/urban.html.

B. Causation

"Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed." *Cantrell*, 241 F.3d at 682; *accord Hall*, 266 F.3d at 975 (Petitioners "'seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs,' . . . establish standing 'without meeting all the normal standards for redressability and immediacy.'" (quoting *Defenders of Wildlife*, 504 U.S. at 572 & n. 7, 112 S. Ct. 2130)). Unlike in an ordinary causation analysis, a petitioner asserting a procedural injury "need only establish 'the *reasonable probability* of the challenged action's threat to[his] concrete interest.'" *Hall*, 266 F.3d at 977 (quoting *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998)) (emphasis added) (alteration in original).

Both in its briefing and at argument, DOT asserted that Public Citizen had not sufficiently established causation because the challenged regulations would not have permitted cross-border Mexican truck traffic unless the President of the United States lifted the moratorium. The President's November 27, 2002 order modifying the moratorium rendered this assertion moot. Even before the President acted, however, Public Citizen's asserted injury could reasonably be linked to DOT's action. Thus, constitutionally adequate causation existed at the time the petitions were filed. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L.Ed.2d 170 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review . . . .").

DOT's argument hinged on the fact that the President, an independent actor not before this Court, had the ability to stop Mexican trucks at the border even if DOT's regulations were implemented. *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir.2000) ("[T]he causal connection put forward for standing purposes cannot be too speculative, or *rely on conjecture about the behavior of other parties* . . . ." (emphasis added)); *cf. Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997) ("[T]he injury must . . . not [be] the result of the independent action of some third party not before the court.").

Thus, two parties had to act before the effect complained of would have come about: the President, who had already indicated his intention to comply with NAFTA by lifting the trucking moratorium, and DOT, which had been obligated by Congress, on penalty of budgetary restrictions, to promulgate safety and inspection regulations governing Mexican trucks. Petitioners and DOT engaged extensively over what would be the appropriate metaphor for such an unusual situation, in which two independent parties had the ability to stop an event from occurring, but both had to take action for the event to occur. Public Citizen suggested that the situation was like a door with two locks, where two independent parties each had to use their keys to open the door, or it would have remained shut. DOT asserted that although it had used its key on one of the locks, the President had the more critical key because its use was entirely within his discretion, and not dependent upon a temporary appropriations rider.

These metaphorical approaches did not help to clarify the situation. The existence of constitutionally suffi-

cient causation does not hinge on keys, doors, or locks. We do not adjudicate imagined hypotheticals or magical metaphors—we must decide the case presented to us. The only relevant question is whether there was a "reasonable probability" that DOT's promulgation of the regulations would result in increased pollution and adverse health effects to Public Citizen and its members.

Even before the recent presidential action, we would have had to conclude that it was reasonably likely that after these regulations became effective, the President would lift the moratorium. "[W]hen standing hinges on choices made by a third party, [a] plaintiff must 'adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressibility of injury.'" *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir. 1994) (quoting *Defenders of Wildlife*, 504 U.S. at 562, 112 S. Ct. 2130). Public Citizen pointed to the introductory text of the regulations, in which DOT stated that it was issuing the regulations "in anticipation of a presidential order lifting the current statutory moratorium on authorizing such operations." Application Rule, 67 Fed. Reg. at 12,702. Public Citizen also pointed to the finding of the NAFTA arbitral panel that the United States' consistent refusal to allow entry to Mexican trucks violated the treaty, and the President's consequent announced intent to modify the moratorium once the regulations were issued.

The argument the other way, however, had some force. "[I]t usually is difficult to establish causation and redressibility when a plaintiff's alleged injury depends on the actions of a third party not before the court." *Yesler Terrace*, 37 F.3d at 446. The Supreme Court

tells us that an acceptable causation analysis cannot rely on "the independent action of some third party not before the court." *Bennett*, 520 U.S. at 167, 117 S. Ct. 1154. Certainly the President is an independent actor. Nevertheless, we find dispositive the lower threshold for causation in procedural injury cases, which often involve third parties whose independent actions are necessary for constitutional injury to occur.

For instance, to use the Supreme Court's example, a person

> living adjacent to the site for a proposed construction of a federally licensed dam has standing to challenge mental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years,

Defenders of Wildlife, 504 U.S. at 572 n. 7, 112 S. Ct. 2130, and, perhaps more importantly, even though there can be no certainty that the company will ever build the dam even were the license granted. Certainly the fact that the dam construction company applied for a license is an indication that it wishes to build the dam, but a myriad of circumstances—financial, political, or meteorological—could intervene to prevent it from actually following through with its plans. Nevertheless, the Supreme Court considers such a case to contain the requisite level of causation, because it is a procedural injury case, requiring only a "reasonable probability" of causation.

Here, the President of the United States had committed himself to a course of action to which the United States was obligated under an important international

treaty, passage of which was hard-fought and not without controversy, and as to which it was then in default. There were, of course, a number of developments that could have changed the President's mind on this issue—political, diplomatic, military, or economic—but that cannot detract from his announced intent to comply with the treaty (at least as far as this standing analysis is concerned). President Bush's public statement that he would lift the moratorium is sufficient for these purposes. Thus, it is no metaphysical exercise to conclude that it was reasonably probable, even before the action actually occurred, that the President would rescind the moratorium.

We must next look at the likelihood of harm to Public Citizen if it does not prevail in this action. If Public Citizen's petition is denied, then there is nothing to keep the regulations from going into effect. Once this occurs, Mexico-domiciled truck companies will apply for licenses to operate in the United States beyond the border zone, Application Rule, 67 Fed. Reg. at 12,714 (creating 49 C.F.R. § 365.503), and DOT will issue permits to those companies that satisfy the requirements of the challenged regulations, *id.* at 12,715 (creating 49 C.F.R. § 365.507). Those companies will then begin to operate their trucks in the United States, emitting pollutants that contaminate the air Public Citizen's members breathe and that could potentially cause them myriad adverse health effects. Although DOT and Public Citizen dispute the number of Mexican trucks that will in fact be granted entry, and the quantity of consequent pollutant emissions, both agree that at least *some* Mexico-domiciled trucks will enter the United States if the regulations are put into effect, and at least *some* pollutants will be emitted. This is a sufficient

causal link between DOT's acts and Public Citizen's alleged injury.

C. Redressability

The third prong of the constitutional standing inquiry requires us to determine whether we possess the ability to remedy the harm that a petitioner alleges. In most procedural injury cases involving environmental analysis, a petitioner "who asserts inadequacy of a government agency's environmental studies . . . need not show that further analysis by the government would result in a different conclusion. It suffices that . . . the [agency's] decision *could be influenced* by the environmental considerations that [the relevant statute] requires an agency to study." *Hall*, 266 F.3d at 977 (emphasis added). Thus, Public Citizen bears a relatively easy burden. If DOT conducted the type of environmental analysis that Public Citizen suggests, its decision could be influenced. Indeed, DOT is required by statute to "insure that . . . environmental amenities and values . . . be given appropriate consideration in [administrative] decisionmaking." 42 U.S.C. § 4332(2)(B).

As the case now stands, if we grant Public Citizen's petitions, no Mexico-domiciled trucks will be permitted into the United States beyond the border zones until DOT conducts the required analyses; and if we deny the petitions, Mexico-domiciled trucks will be permitted into the United States as soon as they complete the registration and certification process provided in the challenged regulations. Thus, the case presents the very paradigm of constitutional redressability: Public Citizen will suffer harm if we deny its petitions, but the harm will be avoided entirely if we grant the petitions.

D. Organizational Standing

A further necessary standing inquiry is whether Public Citizen is entitled to bring suit on behalf of its members. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181, 120 S. Ct. 693 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977)). We conclude that Public Citizen has organizational standing. It has adequately alleged injury to its members. The interests at stake—potential adverse health consequences due to increased pollution from diesel truck exhaust—are pertinent to the interests of environmental organizations and other organizations concerned with the physical well-being of their membership. Finally, there is no indication that resolving this case would require, or even be assisted by the participation of individual members of Public Citizen.

E. Statutory Standing Under the APA

In addition to constitutional standing, a petitioner who:

> brings a statutory enforcement action under the [APA] must meet its statutory requirements for standing. [A petitioner] must establish (1) that there has been final agency action adversely affecting [it], and (2) that, as a result, it suffers legal wrong or that its injury falls within the "zone of interests" of the statutory provision the [petitioner] claims was violated.

Churchill County, 150 F.3d at 1078 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83, 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990)) (internal citations omitted), *as amended*, 158 F.3d 491 (9th Cir. 1998). Public Citizen satisfies the first requirement. Though the regulations at issue are styled as "Interim Final Rule[s]," *see, e.g.*, Application Rule, 67 Fed. Reg. at 12,702, the term "interim" refers "only to the Rule's intended duration—not its tentative nature," *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268-69 (D. C. Cir. 1996) ("Any other construction would suggest that the . . . publication [of the rule] was without legal significance at all (a senseless repetition of the notice of proposed rulemaking).").

As for the second prong, we have held that the APA "require[s] that the 'interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970)). As might be expected, "'NEPA's purpose is to protect the environment, not the economic interests of those adversely affected by agency decisions.'" *Id.* (quoting *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996)). Here, Public Citizen is attempting to protect the environment. Indeed, many of the Petitioners and Petitioners-Intervenors in this case are environmental organizations, or general public interest organizations like Public Citizen that "fight[ ] for a broad range of public interest issues[,][m]any of [which] relate directly or indirectly to environmental concerns." DOT claims that some of the other Petitioners, labor

and trucking organizations—whose standing is irrelevant in any instance—are alleging impermissible economic injuries, but this does not eliminate standing as long as they *also* assert economic/ health concerns. *See id.* at 1158-59.

* * *

In response to our post-argument request for briefing on the significance of the President's modification of the moratorium, DOT makes two additional arguments, neither of which has merit. It first suggests that were we to grant Public Citizen the relief it seeks, that would be tantamount to enjoining Presidential action. We disagree. The President of the United States is not a party to this action, and the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c). We similarly reject DOT's assertion that the relief Public Citizen seeks will somehow affect NAFTA's viability. Again, neither the validity of nor the United States' compliance with NAFTA is before us. Our task here is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by DOT before promulgating the three regulations.

Thus, we conclude that Public Citizen has standing to bring these petitions.

IV. STANDARD OF REVIEW

Review of agency action to determine its conformity with NEPA and the CAA provisions at issue is governed by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th

Cir.2000) (NEPA); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D. C. Cir. 2002) (CAA); *see also City of S. Pasadena v. Slater*, 56 F. Supp.2d 1106, 1134-35 (C. D. Cal. 1999) (CAA review uses same standard as NEPA review). The reviewing court must determine that agency actions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In considering whether an agency acted in an arbitrary and capricious manner, a court "must determine whether the agency articulated a rational connection between the facts found and the choice made." *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001). Furthermore, courts must "carefully review the record to 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors,'" *id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L.Ed.2d 377 (1989)), and may not "'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute,'" *id.* (quoting *NLRB v. Brown*, 380 U.S. 278, 291-92, 85 S. Ct. 980, 13 L.Ed.2d 839 (1965)) (omission in original).

In the context of the procedural environmental requirements imposed by NEPA and CAA, "[t]he arbitrary and capricious standard requires a court to ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors." *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000) (internal quotation marks omitted),

cert. denied, 534 U.S. 815, 122 S. Ct. 41, 151 L.Ed.2d 14 (2001). A reviewing court is not permitted to substitute its judgment for that of the agency, but rather must "'simply . . . ensure that[the agency] has adequately considered and disclosed the environmental impact of its actions.'" *Am. Rivers v. FERC*, 201 F.3d 1186, 1194-95 (9th Cir. 1999) (quoting *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183 (9th Cir. 1997)). This means that we "must defer to an agency's decision that is fully informed and well-considered," *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (internal quotation marks omitted), but "need not forgive a 'clear error of judgment,'" *id.* (citing *Marsh*, 490 U.S. at 378, 109 S. Ct. 1851), or credit "conclusions that do not have a basis in fact," *Ariz. Cattle*, 273 F.3d at 1236.

V. ENVIRONMENTAL ANALYSIS UNDER NEPA

A. DOT's Decision Not to Prepare an EIS

We next determine whether DOT acted in an arbitrary and capricious manner when it failed to prepare an Environmental Impact Statement on the basis of its Environmental Assessment. By its own terms, NEPA intended to reorganize the priorities of the federal government, to integrate "environmental amenities and values" alongside more traditional "economic and technical considerations." 42 U.S.C. § 4332(2)(B). Congress directed that the statute and its implementing regulations be used toward this end in government decisionmaking "to the fullest extent possible." *Id.* § 4332.

To achieve its goal of including environmental concerns in government decisionmaking, NEPA requires that an EIS be prepared for all "major Federal actions

significantly affecting the . . . human environment." *Id.* § 4332(2)(C). In certain circumstances, agencies may first prepare an EA to make a preliminary determination whether the proposed action will have a significant environmental effect. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4), *cert. denied*, 534 U.S. 1104, 122 S. Ct. 903, 151 L.Ed.2d 872 (2002). "If the EA establishes that the agency's action '*may* have a significant effect upon the . . . environment, an EIS must be prepared.'" *Id.* (quoting *Found. for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982)) (emphasis and alteration in original). "If not, the agency must issue a Finding of No Significant Impact (FONSI), accompanied by 'a convincing statement of reasons to explain why a project's impacts are insignificant.'" *Id.* (quoting *Blue Mountains*, 161 F.3d at 1212) (internal citations and quotation marks omitted).

Thus, to decide whether an EIS is required, we must determine: (1) whether the challenged rules constitute "major" federal actions; and (2) whether they may significantly affect the environment. We find that DOT's rules are major federal actions that may significantly affect the environment, and thus we hold that DOT acted in an arbitrary and capricious manner in failing to prepare an EIS for the challenged regulations.

1. "*Major Federal Action*"

The Council on Environmental Quality ("CEQ"), a body established by NEPA, 42 U.S.C. §§ 4342- 4347, has issued regulations implementing NEPA. We rely on these regulations to "guide our review of an agency's

compliance with NEPA," *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 n. 1 (9th Cir. 2002), and the Supreme Court has held that they are entitled to substantial deference, *Marsh*, 490 U.S. at 372, 109 S. Ct. 1851. The relevant CEQ regulations implementing NEPA define "major Federal action[s]" as "actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "[a]doption of official policy, such as rules, regulations, and interpretations." 40 C.F.R. § 1508.18. DOT, of course, does not dispute that its actions are "federal," but does dispute Petitioners' allegations regarding the regulations' "effects." DOT alleges that the effects of the Application and Safety Rules are limited to the increased diesel emissions of Mexican trucks during the road-side inspections and safety monitoring mandated by the regulations. It thus predicts that there will be no increase in Mexican truck traffic resulting from the regulations. DOT's analysis goes on to suggest that even if such an increase might occur, its effects would not require consideration because it would be a result of presidential rescission of the moratorium, not the regulations themselves. This novel parsing of the regulations' effects fails to meet NEPA standards.

DOT's argument here echoes its earlier causation argument in the standing context. It is equally unavailing here for a similar reason. The CEQ regulations make clear that the "effects" of federal actions include "[i]ndirect effects, which are caused by the action and are later in time . . . but are still reasonably foreseeable," *id.* § 1508.8(b), as well as "[c]umulative impact . . . which results from the incremental impact of the action when added to other . . . reasonably fore-

seeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions," *id.* § 1508.7.

We have already concluded that the President's rescission of the moratorium was "reasonably foreseeable" at the time the EA was prepared and the decision not to prepare an EIS was made. *Cf. Native Ecosystems*, 304 F.3d at 896 (holding that a memorandum that "evidences a decision to consider . . . seriously" taking certain actions renders those actions "reasonably foreseeable"). To restrict consideration of the regulations' "effects" in the way DOT proposes would contravene not only the plain language of the CEQ regulations, but also the statutory command of NEPA, that environmental effects of government action be considered "to the fullest extent possible." 42 U.S.C. § 4332.

As for the requirement that the federal action be "major," the CEQ regulations tell us that "[m]ajor reinforces 734 but does not have a meaning independent of significantly," 40 C.F.R. § 1508.18, meaning that a federal action is "major" whenever it has "significant" environmental effects. *See City of Davis v. Coleman*, 521 F.2d 661, 673 n. 15 (9th Cir. 1975).

2. *"Significantly Affecting the Human Environment"*

The CEQ regulations also define the crucial term "significantly," to clarify the situations in which an agency must prepare an EIS:

> "Significantly" as used in NEPA requires considerations of both context and intensity:
>
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as

> society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short-and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. . . . The following should be considered in evaluating intensity:
>
> . . . .
>
> (2) The degree to which the proposed action affects public health or safety.
>
> . . . .
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> . . . .
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27. If DOT's action is environmentally "significant" according to *any* of these criteria, then DOT erred in failing to prepare an EIS. *See Nat'l Parks*, 241 F.3d at 731. An examination of these criteria reveal that the challenged regulations are

environmentally "significant," and an EIS should have been prepared.

(a) *Context*

The CEQ regulations explain that the proposed federal action must be analyzed with regard to several contexts—national, regional, and local—as well as by looking at the short- and long-term effects of the proposed action. Measured against this standard, DOT's EA is woefully inadequate. The EA calculates likely emissions increases if the Application and Safety Rules are implemented. It dismisses those increases as insignificant, however, because they are "very small relative to national levels of emissions." It does not conduct any analysis regarding whether these increases may be localized in certain areas near the Mexican border, including such likely destinations as Southern California or Texas.

Amicus ATA considers it "unreasonable" that DOT should have to "make a determination of the expected routes of 34,000 hypothetical [Mexican trucks]." Regardless of the law's "reasonableness" (a question properly addressed by Congress—not us), this is precisely what NEPA and the CEQ regulations require. The law requires DOT to consider the most likely localities to be affected by increased Mexican truck traffic and to perform more localized analyses for these areas. Indeed, comments submitted to FMCSA during the notice-and-comment period analyzed publicly available government data to predict, not surprisingly, that major cities near the Mexican border would likely suffer the greatest environmental impact as a result of the regulations. The fact that commenters performed such an analysis does not indicate that their analysis

was correct, but rather that it was possible to conduct such an analysis. DOT's failure to do so indicates that it did not take a sufficiently "hard look" at the environmental effects of its actions or at the public comments it received.

Furthermore, DOT failed to address adequately the long-term effects of its actions. In conducting its EA, DOT limited its analysis to the environmental impact of Mexican trucks in the year 2002. This is anomalous in itself, considering that the regulations were scheduled to become effective only as of May 3, 2002. More significantly, the EA offered no projections of the increase (or decrease) in Mexican truck traffic after 2002, though the regulations were certainly expected to continue in effect beyond the end of last year; indeed they would be in effect now absent this action.

ATA contends that increases in Mexican truck traffic in years subsequent to 2002 would be attributable to the "success of NAFTA," rather than to the regulations themselves. This argument is beside the point, as it is impossible to separate increases in truck traffic due to the opening of the border from increases in truck traffic due to successful international trade; it is precisely this desired increase in international trade that prompted DOT to issue regulations facilitating cross-border truck traffic in the first place.

Once again, DOT received this very criticism in public comments during its rulemaking process. The commenters used available government data to estimate future increases in Mexican truck traffic after 2002. This alone should have prompted DOT to conduct a long-term analysis, as required by the CEQ regulations, or at the very least, to "convincing[ly] . . . explain" its absence. *Nat'l Parks,* 241 F.3d at 730.

(b) *Intensity*

(i) *Effect on Public Health and Safety*

Petitioners contend that DOT must prepare an EIS, in part due to the potential effect of the challenged regulations on public health and safety. Although we have never discussed this requirement in the context of air pollution, other courts have considered "even [the] marginal degradation of drinking water" to be environmentally significant for purposes of this regulation. *See United States v. 27.09 Acres of Land*, 760 F.Supp. 345, 353 (S. D. N. Y. 1991). The same could easily be said of a "marginal degradation" of the quality of the air we breathe.

The pollutants at issue are oxides of nitrogen ("NOx") and airborne particulate matter ("PM-10"). These compounds are emitted into the air as part of the exhaust fumes of diesel trucks, such as those that are the subject of the challenged regulations. Petitioners-Intervenors have pointed to a wealth of government and private studies showing that diesel exhaust and its components constitute a major threat to the health of children, contribute to respiratory illnesses such as asthma and bronchitis, and are likely carcinogenic. While these studies were not placed in the administrative record, that does not excuse DOT's failure even to consider whether any negative health effects could be associated with increased diesel exhaust emissions.

(ii) *Uncertainty*

If the environmental effects of a proposed agency action are uncertain, the agency must usually prepare an EIS:

> Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent "speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action."

Nat'l Parks, 241 F.3d at 732 (quoting *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988)) (internal citation omitted) (omission in original).

There are a number of areas of uncertainty regarding DOT's EA that merit additional investigation. The most significant of these is whether, and to what extent, cross-border Mexican truck traffic will increase if DOT implements the regulations. A related question is whether, and to what extent, such increased Mexican truck traffic will consist of trucks producing more dangerous emissions than their United States counterparts.

DOT acknowledges that "there are reasons to believe that [increased traffic and pollution] might occur," but it contends that these increases will be smaller than Petitioners suggest. Strangely, despite DOT's "reasons to believe" that such increases will occur, its EA does not address them. In fact, the EA specifically assumed for the purposes of its study that "the implementation of [the regulations] would not affect the trade volume between the United States [and] Mexico." It contends instead that any increases "would be the result of the modification of the moratorium and not the implementation of the [regulations]." Indeed, the EA asserts that the number of Mexican trucks in the United States will likely decrease as a result of the new regulations

alone, because not all existing Mexican trucks currently operating in the border zone could or will comply with them. This illogical parsing of the cause of increased pollution, i.e., that decreases in truck traffic are credited to DOT's action, but the potentially much larger expected increases in the same traffic are attributed to the President's modification of the moratorium, dictates the EA's overall conclusions.

The EA goes on to evaluate the environmental effects of the regulations—attempting to segregate them from those attributable to the rescission of the moratorium—and concludes that the regulations will actually slightly reduce emissions by Mexican trucks within the border zone, and have no significant effect on air quality beyond the border zone, when evaluated on a national scale. This emissions analysis, in turn, is based on the EA's further assumptions regarding the quality and age of the Mexican truck fleet.

The EA assumes, without stating any basis therefore, that it "considered" approximately one-third of Mexican trucks to be identical to United States trucks manufactured after 1994, while considering the remaining trucks identical to United States trucks manufactured in 1986. (More precisely, the EA "considered" 130,000 of 400,000 Mexican trucks to be manufactured after 1994, and the rest in 1986, and then lamented the "significant confounding variable" in its study, that the analysis programs it used "were based on United States vehicles.") These years are significant because 1994 is the year after which Mexican emissions standards became equivalent to United States standards. The year 1986 was selected, according to DOT, because it was the last year when neither Mexico nor the United States had any relevant emissions regulations in place.

There are two problems with this analysis. First, the EA provides no basis whatsoever for its selection of one-third as the proportion of Mexican trucks manufactured after 1994. Other studies, though not part of the administrative record, have concluded that this percentage is closer to 20% (study by the General Accounting Office) or even 10% (private study commissioned by the California Attorney General). While we do not consider such studies to be conclusive, they are at least founded on some analysis of raw data, and based on some ascertainable methodology. The EA, on the other hand, seems to have randomly selected one-third as its preferred proportion, citing no authority or study for that number.

The second analytical defect echoes our concern regarding the EA's failure to consider long-term effects. The United States has already adopted much stricter emissions regulations that will become effective in 2004 and 2007. *See* 40 C.F.R. § 86.004-11 (2004); *id.* § 86.007-11 (2007). In addition, six major United States diesel truck engine manufacturers have entered into consent decrees in the District Court for the District of Columbia in settlement of CAA violations, in which they have agreed to abide by certain of the 2004 emissions regulations as of October 1, 2002. *See, e.g.*, Consent Decree, *United States v. Caterpillar, Inc.*, No. 98-02544(HHK) (D.D.C. 1999). Neither the EA nor DOT cite to any known plans of the Mexican government to tighten its emissions standards beyond those currently in place. Indeed, the EA never even considered this issue because, as discussed above, it limited its analysis to the year 2002. The existence of regulations and consent decrees that will significantly alter the relative environmental impact of Mexican truck

traffic in the near future would further strengthen the need for the EA to have considered future implications of its actions.

Thus, the EA—assuming no increase in Mexican truck traffic, making an arbitrary assumption about the percentage of newer, "cleaner" Mexican trucks on the roads, and failing to take account of future increasing discrepancies in emissions rules—conducted an environmental analysis that found no increase in emissions due to the regulations' implementation. Our law mandates that an agency complete an EIS "where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent 'speculation on potential . . . effects.'" *Nat'l Parks*, 241 F.3d at 732 (quoting *Sierra Club*, 843 F.2d at 1195) (internal citation omitted) (omission in original). Petitioners raise many uncertainties about the EA, as does amicus the Attorney General of the State of California, *see infra*, and there is no suggestion that these uncertainties do not lend themselves to quantification. (Indeed, Petitioners have submitted a number of studies attempting precisely what DOT should have done.)

Once again, we do not wish to dictate the outcome of the analysis that DOT must perform. Perhaps DOT will determine that the new regulations will have only a minor impact—one which will be negligible in light of other factors. In the absence of such analysis, however, we cannot defer to the agency's assessment.

(iii) *Threat of Illegality*

The California Attorney General asserts that DOT failed to take account of California's emissions regulations, which are "more stringent than the federal

standards." In its determination of whether its proposed action is significant, an agency must consider "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10); *accord Sierra Club*, 843 F.2d at 1195. In *Sierra Club*, we faulted the Forest Service's EA for its failure to consider, or even mention, California's water quality standards, which might have been threatened by proposed timber sales. *See Sierra Club*, 843 F.2d at 1195. The same fault is present here. California has mandated the adoption of airborne pollutant standards for the state, Cal. Health & Safety Code § 39606 (West 2002), and has adopted rules setting specific limits for airborne pollutants, including NOx and PM-10, Cal. Code Regs., tit. 17, §§ 70100-200 (2002). Regardless of whether the influx of Mexican trucks will cause the levels of these pollutants to rise beyond California's air quality limits—an issue on which the record before us is insufficient—DOT had an obligation to consider whether its regulations *might* violate these rules.

The California Attorney General also points out that DOT's actions could violate the CAA, thus further triggering the illegality prong of the significance analysis. Because we find that DOT violated the CAA, *see infra*, this further strengthens our conclusion that DOT's actions are environmentally significant for NEPA purposes.

(iv) *Controversy*

"Controversy" sufficient to require preparation of an EIS occurs "when substantial questions are raised as to whether a project . . . may cause significant degrada-

tion of some human environmental factor, or there is a substantial dispute [about] the size, nature, or effect of the major Federal action." *Nat'l Parks*, 241 F.3d at 736 (internal citations omitted and alterations in original). The evidence establishing such a controversy must be brought to the agency's attention while the agency is conducting its deliberations, not *post hoc*. *See id.* Thus, the controversy requirement is two-fold: Petitioners must show that there was a "substantial dispute" about DOT's actions and that this dispute raised "substantial questions" about their validity. The burden then shifts to DOT to provide a "convincing" explanation why no controversy exists. *See id.*

Petitioners' claim satisfies the first requirement. We have held that an "'outpouring of public protest'" —where, for example, 85% of public comments opposed the proposed agency action—constitutes a substantial dispute. *Id.* (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1334 (9th Cir. 1992)). Here, "[o]ver 90 percent of the comments opposed" DOT's regulations. Application Rule, 67 Fed. Reg. at 12,704. DOT timely received these comments, and duly noted their existence in the comments accompanying the final regulations. *See id.*

Petitioners' claim also satisfies the second requirement. A substantial portion of the negative comments offered real criticism of DOT's action and its failure to adequately assess its 743 environmental impact. These comments, several of which were made by the future litigants here, as well as by other national environmental organizations, describe many of the defects discussed above. Because many of these criticisms have merit, and DOT failed to adequately account for its failure to act on them, its action is "controversial"

under the CEQ regulations and requires preparation of an EIS.

(c) *Convincing Statement of Reasons*

In sum, Petitioners have successfully demonstrated that DOT's proposed regulations may have a "significant" environmental impact, mandating the preparation of an EIS. DOT has failed to demonstrate that its EA contains anything close to the statutorily required "convincing statement of reasons" sufficient to support a decision not to prepare an EIS. We are similarly unpersuaded by DOT's last-ditch argument that, as an agency with no jurisdiction over environmental matters, it need not consider the environmental consequences of its actions. This argument flies in the face of the text of NEPA, which requires that "*all* agencies of the Federal Government shall. . . . include in every . . . major Federal action[ ] significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332(2) (emphasis added).

One final point regarding the shortcomings of DOT's EA is that its analysis is limited to comparing the status quo (the "Baseline Scenario") to the situation in which the regulations had been implemented (the "Proposed-Action Scenario"). By not considering additional alternatives (such as, for example, proposing more stringent controls on incoming Mexican trucks), DOT further failed to abide by NEPA's statutory command to prepare a "detailed statement . . . on . . . alternatives to the proposed action." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1508.25(b)(2) (defining "[a]lternatives" to include "[o]ther reasonable courses

of actions [sic]"). Indeed, the CEQ regulations state that consideration of alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. "The rule of reason guides 'both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative.'" *Am. Rivers*, 201 F.3d at 1200 (quoting *City of Carmel-by-the Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)). "'[F]or alternatives which were eliminated from detailed study, [an agency must] briefly discuss the reasons for their having been eliminated.'" *Id.* (quoting 40 C.F.R. § 1502.14(a)) (emphasis omitted). Thus, in preparing its EIS, DOT should explore a wider range of alternatives.

B. Categorical Exclusion of the Certification Rule

We next must determine whether DOT acted arbitrarily and capriciously in failing to conduct any NEPA environmental analysis at all for the Certification Rule. DOT contends that this rule falls within an exception to the generally applicable requirements of NEPA. The CEQ regulations allow categorical exclusion of actions "which do not individually or cumulatively have a significant effect on the human environment *and* which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4 (citing 40 C.F.R. § 1507.3) (emphasis added). For such actions, "neither an environmental assessment nor an environmental impact statement is required." *Id.*

Agencies are required to develop guidelines as to which of their actions do or do not require the preparation of an EA or an EIS. *See id.* § 1507.3. FMCSA, as a constituent agency, is subject to DOT's guidelines.

See Dep't of Transp., Order 5610.1C, at ¶ 20(a)(2) (Sept. 18, 1979), *as amended* (July 13, 1982 and July 30, 1985), *available at* http://isddc.dot.gov [hereinafter "DOT Order 5610.1C"]. Individual agencies within DOT are permitted to issue their own guidelines, *id.* ¶ 20(a)(1), but FMCSA has not done so.

Therefore, we must examine DOT's Order to determine whether the Certification Rule falls within those categories of actions that it has "found to have no [environmental] effect." 40 C.F.R. § 1508.4. Paragraph 4(c) of the order specifies the categorical exclusions DOT employs. *See* DOT Order 5610.1C, at ¶ 4(c). The list includes such actions as "[a]dministrative procurements," "[p]ersonnel actions," and "[p]roject amendments (e.g. increases in costs) which do not significantly alter the environmental impact of the action." *Id.* There is no categorical exclusion that seems even plausibly capable of encompassing the Certification Rule.[6] In effect, DOT is arguing that,

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[6] The "categorical exclusions" paragraph of DOT Order 5610.1C reads as follows:

> c. *Categorical Exclusions.* The following actions are not Federal actions with a significant impact on the environment, and do not require either an environmental assessment or an environmental impact statement:
>
> (1) Administrative procurements (e.g. general supplies) and contracts for personal services;
>
> (2) Personnel actions (e.g. promotions, hirings);
>
> (3) Project amendments (e.g. increases in costs) which do not significantly alter the environmental impact of the action;
>
> (4) Operating or maintenance subsidies when the subsidy will not result in a change in the effect on the environment; and

even though the Certification Rule is not subject to any of DOT's categorical exclusions, it should be categorically excluded from the EA/EIS requirement because it has no significant environmental impact. This cannot be the case.

We review an agency's determination that a particular action falls within one of its categorical exclusions under the arbitrary and capricious standard. *Alaska Ctr. for Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999); *see also California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002). "[A]n agency's interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation." *Alaska Ctr.*, 189 F.3d at 857. DOT has failed to identify any particular categorical exclusion applicable to the Certification Rule and may not do so *post hoc*. *Norton*, 311 F.3d at 1175. Even if it could, any claim that one of these exclusions applied would be contrary to the plain text of the DOT Order, and thus "inconsistent with the terms used in the regulation," and not entitled to our deference. Thus, DOT acted in an arbitrary and capricious manner by failing to prepare an EIS, or at least in failing to prepare an EA for the Certification Rule and then determining on that basis whether to prepare an EIS.

> (5) Other actions identified by [individual] administrations as categorical exclusions pursuant to paragraph 20.
>
> (6) The following actions relating to economic regulation of airlines . . . .

DOT Order 5610.1C, at ¶ 4(c). As noted above, FMCSA has not promulgated its own supplemental rules pursuant to ¶ 4(c)(5).

VI. CONFORMITY DETERMINATION UNDER THE CAA

Petitioners also contend that DOT acted arbitrarily and capriciously in failing to conduct a conformity determination under the CAA. The CAA requires EPA to establish air quality standards for certain pollutants, 42 U.S.C. § 7409, and it has done so with respect to NOx and PM-10, the pollutants most at issue here, 40 C.F.R. § 50.6, .7, .11. Each state, in turn, is required to adopt and submit for EPA approval a State Implementation Plan ("SIP") for each pollutant. 42 U.S.C. § 7410(a)(1). Each state is divided into "air quality control regions," which are classified as "attainment" or "nonattainment" with respect to each pollutant for which there exists an air quality standard. *Id.* § 7407. SIPs must contain emissions limitations and other measures designed to bring "nonattainment" regions into attainment. *Id.* § 7410(a)(2).

To ensure compliance with these plans, the CAA contains a "conformity" requirement, mandating that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." *Id.* § 7506(c)(1). Most federal actions affecting levels of pollutants in nonattainment regions require that the responsible agency conduct a "conformity determination." 40 C.F.R. § 93.150-.160. However, two categories of federal action are exempted from this requirement: (1) "[a]ctions where the total of direct and indirect emissions are below the emissions level specified in [the regulations]," *id.* § 93.153(c)(1); and (2) "[a]ctions which would result in no emissions increase or an increase in emissions that is clearly de

minimis," including "[r]ulemaking and policy development and issuance," *id.* § 93.153(c)(2). DOT argues that its regulations fall within both of the above-listed exceptions: that the total emissions caused by the regulations fall below the specified amount, and that the regulations are categorically excluded from the statutory requirements because they are "rulemaking." We review under the arbitrary and capricious standard an agency's decisions regarding SIP conformity determinations, as well as its decisions that certain projects do not require conformity determinations. *Olmsted Falls*, 292 F.3d at 270.

DOT's assessment that its regulations will cause emissions below the amounts specified in 40 C.F.R. § 93.153(b)(1), thus excusing it from making a conformity determination, is based on the predicted emissions in its EA. As we have already determined, however, DOT failed to conduct a reliable environmental analysis. Because of its illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry, DOT systematically underestimated the emissions that would result from its regulations. Furthermore, there were a number of methodological flaws in DOT's EA, including, most relevantly for CAA purposes, the failure to consider its regulations' environmental impact on a local or regional basis.

The CAA mandates that each state be divided into "air quality control regions," which are evaluated individually as to their compliance with air quality standards. 42 U.S.C. § 7407. Thus, proper CAA analysis must be conducted at the local and regional levels. The national emissions analysis in DOT's EA is inadequate to comply with the CAA. Because DOT is

required to perform a new, more thorough region-by-region environmental analysis to achieve compliance with NEPA, it should also determine, as a result of its new analysis, whether the emissions resulting from its actions will truly fall below the levels established in § 93.153(b)(1). *Cf. Olmsted Falls*, 292 F.3d at 270-73 (holding that petitioners did not meet their burden of proof on whether a conformity determination was required by simply suggesting that it was an "open question" whether the emissions limits would be exceeded).

Second, DOT claims that by listing "[r]ulemaking" as a type of "[a]ction [ ] which would result in no emissions increase or an increase in emissions that is clearly de minimis," 40 C.F.R. § 93.153(c)(2), the EPA intended to exempt *all federal regulations* from the requirements of the CAA. Petitioners respond that the exception encompasses only the process of rulemaking itself, but not the agency's implementation and execution of validly promulgated regulations. A careful reading of the EPA regulations, keeping the statutory purpose in mind, dispenses with DOT's erroneous, albeit novel, assertion.

The first striking element is that "rulemaking" is listed as a type of "[a]ction[ ] which would result in no emissions increase or an increase in emissions that is clearly de minimis." *Id.* If the EPA drafters truly intended to exempt all federal regulations from the conformity determination requirement, they certainly would have been aware that some federal regulations do in fact result in an increase in emissions (or an increase that is not merely de minimis). Indeed, the EPA regulations specify that there are two kinds of

emissions, "direct emissions" and "indirect emissions." *Id.* § 93.152.

Indirect emissions are defined as:

> those emissions . . . that . . . [a]re caused by the Federal action, but may occur later in time . . . from the action itself but are still reasonably foreseeable; and . . . [t]he Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Id. "Caused by" was used to refer to "emissions that would not otherwise occur in the absence of the Federal action." *Id.*

Using the but-for analysis suggested by the EPA regulations, a substantial number of federal regulations would result in emissions above de minimis levels. If the EPA had wished to exclude *all* federal regulations from the scope of this requirement, it easily could have made a bolder statement exempting all federal regulations, *regardless* of whether they cause direct or indirect emissions.

Another clue as to the proper interpretation of the de minimis exception is the fact that the exception is for "rulemaking and policy development and issuance." *Id.* § 93.153(c)(2)(iii). This juxtaposition strongly suggests that Petitioners are correct in arguing that the "rulemaking" exception should apply only to the process of developing and issuing federal regulations, as opposed to the substantive result produced by the actual implementation of the final rules.

Finally, it is relatively easy to imagine federal regulations or "policies" that could have drastic effects

on emissions of regulated substances. Even assuming that it is possible the EPA intended these regulations to exclude such actions from the ambit of the CAA's statutory requirements, such a reading would conflict with the basic command of the statute: "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." 42 U.S.C. § 7506(c)(1). "A federal regulation in conflict with a federal statute is *invalid* as a matter of law." *Watson v. Proctor (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998) (citing *Chem. Mfrs. Ass'n v. Natural Res. Defense Council, Inc.*, 470 U.S. 116, 126, 105 S. Ct. 1102, 84 L.Ed.2d 90 (1985)) (emphasis in original). Consequently, the Supreme Court has held that an agency's interpretation of a regulation that conflicts with the plain language of the statute is entitled to "no deference." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989). Thus, we read the EPA regulation, to preserve its validity, so that the categorical exception encompasses only the "development and issuance" of federal regulations, not the substantive results of their promulgation and implementation.

This conclusion does not conflict with *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D. C. Cir.) (per curiam), *as amended*, 92 F.3d 1209 (D. C. Cir. 1996). In *Environmental Defense Fund*, the D.C. Circuit examined the validity of EPA regulations nearly identical to those here,[7] and specifically concluded that the "de

[7] The *Environmental Defense* decision analyzed 40 C.F.R. § 51.850-.860, which concerned CAA conformity determinations of SIPs with DOT programs under Title 23 of the United States Code

minimis" exceptions were "an appropriate exercise of the EPA's authority, inherent in the statutory scheme." *Id.* at 467. In examining the regulations, the court considered the conclusion "that the categorical exemptions are de minimis [to be] entirely self-evident; the EPA has concluded that these activities 'would result in no emissions increase or an increase in emissions that is clearly de minimis,' and we neither see nor would expect to find any evidence to the contrary." *Id.* (quoting 40 C.F.R. § 51.853(c)(2)). Had the D.C. Circuit been reading the EPA regulations in the manner DOT suggests, it certainly "would expect to find" at least *some* evidence tending to contradict such a premise. Though it did not discuss the "rulemaking" exception specifically, the D.C. Circuit suggests that it would have invalidated the EPA regulation as conflicting with the CAA had the language or context suggested such a broad reading of the regulation. Thus, we decline DOT's suggestion to read the EPA regulation in a way that would tend to under-mine its validity.

VII. CONCLUSION

We have jurisdiction over the petitions for review. We emphasize that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us. The only question before us is whether a federal agency failed to comply with our nation's long-established environmental laws. We hold that the Department of Transportation acted arbitrarily and capriciously in failing to prepare a full Environmental Impact Statement under the National Environmental Protection

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or the Urban Mass Transportation Act, 49 U.S.C. §§ 5301-5338, neither of which are implicated in this case.

Act, as well as a conformity determination under the Clean Air Act. Therefore, we grant the petitions, and remand this matter to the Department of Transportation so that it may prepare a full Environmental Impact Statement and Clean Air Act conformity determination for all three regulations.

GRANTED AND REMANDED.

APPENDIX B

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 365

[Docket No. FMCSA-98-3298]

RIN 2126-AA34

Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border

Tuesday, March 19, 2002

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: The FMCSA revises its regulations and form, OP-1(MX), governing applications by Mexico-domiciled carriers who want to operate within the United States beyond the municipalities adjacent to Mexico in Texas, New Mexico, Arizona and California and beyond the commercial zones of such municipalities ("border zones"). This interim rule includes requirements that were not proposed in the NPRM, but which are necessary to comply with the Fiscal Year 2002 DOT

Appropriations Act enacted into law in December 2001. This action is taken in anticipation of a presidential order lifting the current statutory moratorium on authorizing such operations. The form requires additional information about the applicant's business and operating practices to help the FMCSA to determine if the applicant will be able to meet the safety standards established for operating in interstate commerce in the United States. Carriers that previously submitted an application to operate beyond the border zones must submit the updated form. Any Mexico-domiciled motor carrier (of property) that wants to operate within the United States solely within the border zones must apply under separate FMCSA regulations that we are issuing elsewhere in today's Federal Register. The revisions in this action are part of FMCSA's efforts to ensure the safe operation of Mexico-domiciled motor carriers in the United States and implement the 2002 DOT Appropriations Act. This action will ensure that FMCSA receives adequate information to assess an applicant's ability to comply with U.S. safety standards. It requires that all Mexico-domiciled carriers subject to this rule undergo a safety audit before receiving provisional authority to operate in the United States. Therefore, the FMCSA is publishing this action as an interim final rule and is delaying the effective date in order to consider additional public comments regarding pre-authorization safety audits before grants of provisional authority. These changes will result in the FMCSA being able to better maintain an accurate census of Mexico-domiciled carriers operating beyond the border zones.

DATES: This interim final rule is effective May 3, 2002. We must receive comments by April 18, 2002.

ADDRESSES: You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001 FAX (202) 493-2251, on-line at http://dmses.dot.gov/submit. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at http://dms.dot.gov/search.htm and typing the last four digits of the docket number appearing at the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. FMCSA may, however, issue a final rule at any time after the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Joanne Cisneros, (909) 653-2299, Transborder Office, FMCSA, P.O. Box 530870, San Diego, CA 92153-0870. Office hours are from 7:45 a.m. to 4:15 p.m., p.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Before 1982, Mexico-domiciled motor carriers could apply for authority to operate within the United States by filing an application for such authority with the former Interstate Commerce Commission (ICC). Under the Bus Regulatory Reform Act of 1982 (the Act), Congress imposed a 2-year moratorium on the issuance of new grants of U.S. operating authority to motor carriers domiciled in a contiguous foreign country, or owned or controlled by persons of a contiguous foreign country. The legislation authorized the President to remove or modify the moratorium upon a determination that such action was in the national interest. The Act was developed in response to complaints that neither Mexico nor Canada were permitting U.S. motor carriers the same access to their markets as Mexican and Canadian motor carriers had to U.S. markets. While the trade issues with Canada were resolved quickly, resulting in the moratorium being lifted for Canada-domiciled motor carriers, the trade issues with Mexico were not addressed until the North American Free Trade Agreement (NAFTA) was negotiated in the early 1990s. Legislative and executive extensions have maintained the moratorium for Mexico-domiciled motor carriers since 1982.

A number of Mexico-domiciled motor carriers have been permitted to operate in the United States because they are not covered by the moratorium. The moratorium only applies to new grants of operating authority. Thus, the operations of Mexico-domiciled motor carriers that had obtained unrestricted operating authority before the moratorium was enacted were

unaffected by the moratorium. Additionally, access has been allowed for certain motor carriers whose operations fell outside the ICC's licensing jurisdiction. These carriers receive Certificates of Registration by filing Form OP-2 under the provisions of what is now 49 CFR part 368. These carriers include those that operate solely within the border zones. Also included among these are certain types of carriers whose operations are not restricted to the border zones: U.S.-owned, Mexico-domiciled private carriers; U.S.-owned, Mexico-domiciled carriers of exempt goods; and Mexico-domiciled carriers that only traverse the United States to deliver or pick up cargo or passengers in Canada.

The terms of NAFTA, Annex I, provide that the United States would incrementally lift the moratorium on licensing Mexico-domiciled motor carriers to operate beyond the border zones. Pursuant to the first phase of NAFTA, on January 1, 1994, the President modified the moratorium and the ICC began accepting applications from Mexico-domiciled passenger carriers to conduct international charter and tour bus operations in the United States. In December 1995, ICC promulgated a rule and a revised application form for the processing of Mexico-domiciled property carrier applications. These rules anticipated the implementation of the second phase of NAFTA, providing Mexico-domiciled property carriers with access to the four U.S. States bordering Mexico, and the third phase, providing access throughout the United States. The ICC designated the revised application form OP-1(MX).

Through the ICC Termination Act of 1995 (ICCTA), Congress authorized the President to remove or modify the moratorium upon the President's determination that such action is consistent with United States obliga-

tions under a trade agreement or with United States transportation policy. The ICCTA also dissolved the ICC and transferred the authority to issue new grants of U.S. operating authority for motor carriers and some other of its regulatory functions to the Secretary of Transportation, who delegated this authority to the Office of Motor Carriers (OMC) of the Federal Highway Administration (FHWA).

On December 15, 1995, the International Brotherhood of Teamsters (Teamsters) sought an emergency stay of the ICC rule in the United States Court of Appeals for the District of Columbia. The Teamsters contended that the ICC rule was arbitrary and capricious because it failed to address concerns regarding the safe operation of Mexico-domiciled motor carriers. In their comments on the ICC rule, the Teamsters had requested the ICC to add additional safety questions to the applications filed by Mexico-domiciled carriers to ensure that the applicants were willing and able to comply with applicable safety regulations.

On December 18, 1995, the Secretary of Transportation announced an indefinite delay in implementing the NAFTA motor carrier access provisions. The Court of Appeals subsequently denied the Teamsters' request for an emergency stay of the ICC rule, which became an FHWA regulation upon the termination of the ICC, and set the case for briefing and argument. After the Teamsters' case was briefed and argued, the court ordered the case held in abeyance until the Department decided to commence processing applications of Mexico-domiciled motor carriers seeking authority to operate beyond the border zones. Approximately 190 Mexico-domiciled carriers have filed OP-1(MX) applications with the Department.

Mexico filed complaints against the United States under NAFTA's dispute resolution provisions, challenging the United States' decision to deny further trucking, investment, and bus access. An arbitration panel comprised of five individuals with international trade expertise chosen by the United States and Mexico met in May 2000 to hear the trucking and investment case. The parties engaged in extensive pre- and post-hearing briefing on safety and legal issues.

The panel issued a final report on February 6, 2001, that unanimously concluded that the blanket refusal to process applications of Mexico-domiciled motor carriers seeking U.S. operating authority out of concerns over the carriers' safety was in breach of NAFTA obligations of the United States, specifically NAFTA's provisions ensuring national treatment and most-favored-nation treatment for cross-border services. The panel also unanimously decided that the United States' refusal to permit Mexican nationals to invest in U.S. enterprises that provide transportation of international cargo within the United States violated the United States' NAFTA obligations. In June 2001, the President lifted this part of the moratorium.

With respect to its decision on the U.S. refusal to implement NAFTA's truck access provisions, the panel stated that it did not disagree that truck safety is a legitimate regulatory objective and that it was not limiting U.S. application of its truck safety standards to Mexican carriers operating in the United States provided that they are applied in a manner that is consistent with the United States' NAFTA obligations. The panel noted that compliance with NAFTA obligations did not require the granting of operating authority to Mexican trucking companies that might be unable

to comply with U.S. safety regulations. The panel observed that the United States might not be required to treat applications for operating authority from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as the applications are reviewed on a case-by-case basis. The panel stated that to the extent that Mexican licensing and inspection requirements might not be like U.S. requirements, the United States might be justified in using methods to ensure Mexican carrier compliance with the U.S. regulatory regime that differ from those used for U.S. and Canadian carriers, provided that such different methods are used in good faith to address legitimate safety concerns and fully conform with all relevant NAFTA provisions.

It is important to note that this interim final rule and the two related rules published elsewhere in today's Federal Register represent only part of the FMCSA's effort to ensure the safe operation of Mexico-domiciled motor carriers in the United States. For example, Mexico-domiciled motor carriers, their vehicles, and their drivers operating in the United States have been and will continue to be subject to all of FMCSA's safety requirements, inspection procedures, enforcement mechanisms, and fines and out-of-service orders. In addition to being subject to the various safety audits and compliance reviews contained in these rules, these carriers and their vehicles and drivers will continue to be subject to roadside vehicle inspections performed at the border and throughout the United States by FMCSA inspectors and their State partners. FMCSA has received additional funding from Congress to enhance its inspection capabilities at the border. The FMCSA is also conducting seminars in Spanish for

Mexican carriers to help ensure that they understand U.S. safety requirements. FMCSA personnel also expect to continue their cooperative efforts with their Mexican Government counterparts toward enhancing Mexico's motor carrier regulatory regime.

The DOT's Research and Special Programs Administration (RSPA) has made considerable progress in harmonizing the hazardous materials standards of the United States and Mexico. Though Mexican hazardous materials standards are not as comprehensive as U.S. standards, those in place are compatible with U.S. standards.

RSPA has also made significant strides in educating Mexico-domiciled hazardous materials shippers and carriers in hazardous materials safety. In 1993, it translated the U.S. Emergency Response Guide into Spanish. Since then, Mexican emergency response information requirements have been harmonized with existing U.S. emergency response information requirements. The U.S., Mexican and Canadian Governments now jointly issue an Emergency Response Guide. RSPA has also translated various hazardous materials brochures and pamphlets into Spanish as well as identified free hazardous materials industry resources to assist the Mexican Government's Secretaria de Comunicaciones y Transportes (SCT) in providing hazardous materials and emergency response training for its inspectors.

Section 350 of the 2002 DOT Appropriations Act, Public Law 107-87 (Act), prohibits the Secretary of Transportation from obligating or expending funds for reviewing or processing applications of Mexico-domiciled motor carriers for authority to operate beyond the United States municipalities and com-

mercial zones on the United States-Mexico international border until the FMCSA and DOT complete several enumerated actions. Many of the requirements of the Act have been incorporated into this interim final rule and the two companion rules published elsewhere in today's Federal Register. Under this interim final rule FMCSA will: (1) Conduct safety examinations or audits on Mexico-domiciled carriers seeking authority to operate beyond the border zones encompassing the nine areas of inquiry required by section 350(a)(1)(B); (2) assign a distinctive U.S. DOT number to each Mexico-domiciled motor carrier operating beyond the border zones, in accordance with section 350(a)(4); (3) require Mexico-domiciled motor carriers operating beyond the border zones to certify that they will have their vehicles inspected by Commercial Vehicle Safety Alliance (CVSA)-certified inspectors every three months, in accordance with section 350(a)(5); and (4) require Mexico-domiciled carriers to provide proof of valid insurance issued by an insurance company licensed in the United States before granting them authority to operate beyond the border zones, in accordance with section 350(a)(8).

FMCSA invites comments about how the interim final rule incorporates these new section 350 provisions into the application and approval process.

Summary of Notice of Proposed Rulemaking (NPRM)

The FMCSA proposed changes to its regulations and application procedures for Mexico-domiciled motor carriers desiring to operate within the United States under the NAFTA liberalized access provisions in the May 3, 2001 Federal Register (66 FR 22371*)*. Appli-

cants wanting to conduct transportation services within the United States beyond the border zones would submit a redesigned Form OP-1(MX). The proposed application solicited information to indicate the nature of the operation, demonstrate the applicant's knowledge of the basic requirements of the Federal Motor Carrier Safety Regulations (FMCSRs) and describe how it intended to comply with these regulations. Furthermore, we proposed to require each applicant to make specific certifications of compliance, such as requiring an applicant to submit verification from the Mexican Government that it is a registered Mexico-domiciled carrier authorized to conduct motor carrier operations up to the United States-Mexico border and that all drivers who operate in the United States have a valid Licencia Federal de Conductor (LFC) issued by the Government of Mexico. The applications would also be subject to the other procedures set forth in part 365 for applications in the OP-1 series (e.g., protests and publication in the FMCSA Register).

Discussion of Comments to the NPRM

In response to the three NPRMs relating to NAFTA implementation, the FMCSA received over 200 comments. Over 90 percent of the comments opposed the safety monitoring system or the border opening. Most of the comments focused on the proposed safety monitoring system (66 FR 22415) and will be fully discussed elsewhere in today's Federal Register. A large percentage of the commenters addressed all three rules together in a single submission that may have been filed in one or all three public dockets. We have carefully considered them and have revised the Form

OP-1(MX) application form and the regulations governing the application process as noted in the preamble sections titled "Discussion of the Interim Final Rule" and "Final Revisions to Form OP-1(MX)." In this section, FMCSA responds to the comments on Form OP-1(MX) (and common elements to Form OP-2) and part 365.

The Friends of the Earth, Natural Resources Defense Council, Sierra Club, and Center for International Law (Friends of the Earth et al.) jointly commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children from environmental and health and safety risks. The International Brotherhood of Teamsters (Teamsters) also expressed this viewpoint. The Friends of the Earth et al. believe that 40 CFR 1501.3(b) requires that if DOT is not certain that an environmental impact statement is required, then it must first prepare an environmental assessment. Regarding compliance with Executive Order 13045, the Friends of the Earth et al. believe that this action presents increased pollution and safety concerns that pose a disproportionate risk to children.

The FMCSA is preparing an agency order to meet the requirements of DOT Order 5610.1C (that establishes the Department of Transportation's policy for compliance with NEPA by the Department's administrations). The FMCSA has conducted a programmatic environmental assessment (PEA) of the three rulemakings in accordance with the DOT Order and the regulations of the Council on Environmental Quality. A discussion of the PEA and its findings and the FMCSA's responsibilities under E.O. 13045 is pre-

sented later in the preamble under "Regulatory Analyses and Notices." A copy of the PEA is in the docket to this rulemaking.

The Attorney General for the State of California submitted a comment in which he asserted that the FMCSA would be required to perform a "conformity determination" pursuant to the Clean Air Act (CAA), before finalizing these rulemakings. Under the CAA, Federal agencies are prohibited from supporting in any way, any activity that does not conform to an approved State Implementation Plan (SIP), (42 U.S.C. 7006). EPA regulations implementing this provision require Federal agencies to determine whether an action would conform with the SIP (a "conformity determination"), before taking the action (40 CFR 93.150*)*. The Attorney General asserts that the FMCSA must make a conformity determination before taking final action to implement regulations that would allow Mexican trucks to operate beyond the border. The Attorney General provided technical information to support his assertion that allowing Mexican trucks to operate beyond the border would likely not be in conformity with California's SIP.

We have reviewed our obligations under the CAA, and believe that we are in compliance with the general conformity requirements as implemented by the U.S. Environmental Protection Agency (EPA). EPA's implementing regulations exempt certain actions from the general conformity determination requirements. Actions which would result in no increase in emissions or clearly a de minimis increase, such as rulemaking (40 CFR 93.153(c)(iii)), are exempt from requiring a conformity determination. In addition, actions which do not exceed certain threshold emissions rates set forth in 40

CFR 93.153(b) are also exempt from the conformity determination requirements. The FMCSA rulemakings meet both of these exemption standards. First, as noted elsewhere in this preamble to this rule, the actions being taken by the FMCSA are rulemaking actions to improve FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border. Second, the air quality impacts from each of the FMCSA's rules neither individually nor collectively exceed the threshold emissions rates established by EPA (see Appendix C of the Environmental Assessment accompanying these rulemakings for a more detailed discussion of air quality impacts). As a result, we believe that FMCSA's rulemaking actions comply with the CAA requirements, and that no conformity determination is required.

The American Insurance Association (AIA) commented that the OP-1(MX) form does not make clear the fact that layered insurance filings (primary and excess securities) are acceptable. The AIA suggested modifying the form to make it clear. The FMCSA does not find this modification to be necessary because the acceptability of layered insurance filings is clearly explained in 49 CFR part 387, subpart C.

The International Brotherhood of Teamsters (Teamsters) commented that the financial responsibility section of the form should be modified to make clear that we would not grant provisional operating authority until we receive the appropriate filings for financial responsibility and service of process agents from the applicant and its financial responsibility agent(s). The AFL-CIO's Transportation Trades Department (TTD) commented that various statements and certifications

could be made more understandable. The FMCSA will verify that a carrier has the necessary financial responsibility as part of the pre-authorization safety audit. However, there will be no DOT number issued at that time under which a filing may be made. Therefore, we will permit insurance companies to file evidence of insurance with FMCSA after provisional authority is granted. However, provisional operating authority will not be valid, and the carrier may not operate under that authority, until an insurance filing is made with, and accepted by, the agency. This is consistent with the procedure applicable to U.S. and Canadian carriers required to obtain operating authority under 49 U.S.C. 13901. In a similar vein, we are giving applicants the option of including with the application a notification that a process agent service will electronically file the necessary process agent information within 90 days. As is the case with U.S. and Canadian carriers subject to 49 U.S.C. 13901, a Mexico-domiciled carrier may not operate in the United States until the process agent filing is made with, and accepted by, the agency.

United Parcel Service (UPS) commented that the application and regulations for Mexico-domiciled carriers requesting operating authority should identify express delivery as a separate kind of carrier operation. UPS explains that this distinction would enable the United States to accelerate the timeline for lifting the moratorium for express delivery services, without awaiting action on general trucking.

We do not see the need at this time for the rules to distinguish between express delivery services and general trucking services. We do not expect that the moratorium will be lifted for express delivery services before the lifting of the moratorium on general truck-

ing. In addition, the United States maintains a reservation under the NAFTA on the transportation of goods other than international cargo between points in the United States, and the reservation covers both express delivery services and other motor carrier services.

The Owner-Operator Independent Drivers Association, Inc. (OOIDA) and the California Trucking Association (CTA) recommended that the form specify the additional U.S. laws to which Mexico-domiciled carriers would be subject. The OOIDA commented that since NAFTA requires Mexico-domiciled carriers to comply with U.S. laws and all applicable State laws when operating within the United States, the FMCSA should set forth the particular U.S. laws to which applicants are subject. They believe form references to other laws are too vague and should be more fully enumerated. The CTA recommends modifying the form to require an applicant to certify that it will comply with the laws of other U.S. agencies.

The FMCSA believes that it is beyond the scope of this rulemaking to provide an exhaustive listing and explanation on the OP-1(MX) form of all Federal and State laws to which carriers are subject when operating within the United States. However, we are conducting information sessions for potential applicants where, among other things, we discuss additional information provided by other Federal agencies and State registration requirements. This information will also be on the FMCSA web site.

We have worked closely with other Federal agencies, including the U.S. Department of Labor (DOL), U.S. Environmental Protection Agency (EPA) and others, in drafting and clarifying the statement that appears after the signature line of Section VIII—Compliance Certifi-

cations. This statement underscores the importance of complying with all pertinent Federal, State, local and tribal statutory and regulatory requirements, including labor, environmental, and immigration laws. Such compliance includes producing requested records for review and inspection. It also includes compliance by drivers who must meet the requirements under the Immigration and Nationality Act, 8 U.S.C. 1101 et seq., and pass inspection by inspectors of the Immigration and Naturalization Service at the port of entry.

The American Trucking Associations, Inc. (ATA), OOIDA, the Teamsters, and the TTD expressed concern that the hazardous materials requirements listed in the safety certification statements were incomplete, suggesting a more comprehensive listing of requirements, including the hazardous material registration requirement. They suggested additional hazardous materials documentation to be submitted with the application. The Transportation Lawyers Association (TLA) believes that the current and proposed application procedures have a loophole regarding identification of hazardous materials carriers. It contends that the "check the block" system, and the fact that none of the information described in the hazardous materials certification statements must be submitted with the application, enable the hazardous materials transporter to escape detection. Neither the form nor application procedures require a carrier who later decides to transport hazardous materials to notify the FMCSA or provide evidence of knowledge of hazardous materials standards—only to increase the amount of insurance carried.

We have corrected and modified the hazardous material certifications in response to these comments.

The hazardous materials certification statements have been revised to more thoroughly reference applicable hazardous materials requirements and request the supplemental information required by the Hazardous Materials Regulations. Please reference the section "Final Revisions to the Form OP-1(MX)" for a detailed discussion of revisions to the certification statements. Information regarding hazardous materials operations will be verified during the pre-authorization safety audit established in this interim final rule pursuant to section 350 of the DOT Appropriations Act.

Section 350 of the Act prohibits Mexico-domiciled motor carriers from transporting hazardous materials in a placardable quantity beyond the border zones until the United States has completed an agreement with the Government of Mexico ensuring that drivers of such placardable quantities of hazardous materials meet substantially the same requirements as U.S. drivers carrying such materials. Section 1012(b) of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA PATRIOT Act) [Pub. L. 107-56, October 26, 2001] amended the Hazardous Materials Transportation Act (49 U.S.C. 5101-5127) and the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. 31301-31317*)* by placing limitations on the issuance or renewal of hazardous materials licenses. (The DOT interprets the term "hazardous materials licenses" to mean a hazardous materials endorsement for a commercial driver's license because of the reference to section 31305 in section 1012(b).) The OP-1(MX) form will require additional information regarding cargo tank certification, hazardous materials training,

and persons responsible for ensuring compliance with the Hazardous Materials Regulations.

The CTA commented that the FMCSA should distribute an applicant's Single State Registration System (SSRS) filing to the appropriate SSRS members. The FMCSA does not have the resources to coordinate the SSRS filings for Mexico-domiciled carriers. We have also removed specific references to the SSRS from the form instructions (although the requirement still remains), because it is one of many State requirements. We do not wish to imply that the SSRS requirement is the sole State requirement for Mexico-domiciled carriers or that it has greater importance than other laws or regulations.

The TLA commented that the definition of private carrier in the instructions to the application form includes a phrase that has historically described a for-hire carrier and suggests that the form be modified. In Section III of the instructions, a motor private carrier is defined as an entity that is "transporting its own goods, including an entity that is performing such operations under an agreement or contract with a U.S. shipper or other business."

This definition is an attempt to rephrase, in plain language, the text of 49 U.S.C. 13102(7). Section 13102(7) defines foreign motor private carrier to include persons (except motor carriers of property or motor private carriers) that provide interstate transportation of property by motor vehicle under agreements or contracts with persons who are not motor carriers of property or motor private carriers. The form instructions may be confusing because they do not reference the for-hire motor carrier exclusion in defining a

private carrier. Therefore, we have modified the form to provide clarity.

Camara Nacional del Autotransporte de Cargo (CANACAR) commented that we must more fully explain the need for a process agent in the United States and link this requirement directly to safety and NAFTA. CANACAR believes we should require only one process agent in the United States. It commented that requiring more than one would violate NAFTA.

Contrary to CANACAR's suggestion, nothing in the NAFTA limits the rights of the United States to require firms to designate more than one process agent. Requiring Mexico-domiciled carriers to comply with 49 CFR part 366 would not violate NAFTA because the same requirement applies to U.S. and Canadian motor carriers. A process agent service may be used to maintain service of process agents in multiple States, thus eliminating the need for carriers themselves to retain agents in each State. A process agent service is an association or corporation that files with the FMCSA a list of process agents for each State in which the carrier intends to operate.

CANACAR believes that FMCSA must remove registration requirements for agricultural, private, and exempt carriers, because we do not require U.S. and Canadian agricultural, private, and exempt carriers to register under 49 U.S.C. chapter 139.

The Motor Carrier Safety Act of 1984, *Public Law 98-554*, 98 Stat. 2832, required Mexican motor carriers conducting operations otherwise exempt from the economic regulation requirements (i.e., for-hire carriers of exempt commodities, agricultural and private carriers) to register with the Interstate Commerce Com-

mission to conduct operations in the United States. These requirements are an important element of FMCSA's effort to ensure the safe operation of Mexican motor carriers on U.S. highways. From a safety standpoint, there is no distinction between agricultural, private, and exempt carriers and the Mexican carriers that would otherwise be required to register.

CANACAR also believes that the OP-1(MX) and OP-2 form questions about affiliates will violate section 219 of the Motor Carrier Safety Improvement Act (MCSIA), which it interprets to mean that "once NAFTA is implemented" questions about affiliates would no longer be needed. CANACAR commented that section 219 of MCSIA only applies to "carriers" and not "nationals."

The FMCSA will continue to require OP-1(MX) applicants to submit information on affiliations because it is useful in deterring operations by disqualified carriers. Section 219 of MCSIA authorizes FMCSA to penalize and disqualify foreign motor carriers for operating beyond the border zones before the implementation of NAFTA, but it does not prohibit enforcement after NAFTA's implementation (nor the collection of information on a foreign carrier's affiliations). FMCSA requires similar information from U.S. and Canadian applicants to ensure that unsafe carriers do not evade out-of-service orders or registration suspensions by continuing operations under a different identity.

The Free Trade Alliance San Antonio recommends that we provide a sample completed OP-1(MX) form, including attachments, as a guide to applicants. The FMCSA will address this comment in training materials and in our workshops for potential applicants.

The TLA commented that the proposed forms require a carrier operating "small vehicles (GVWR under 10,000 pounds)" to certify that "it is exempt from the U.S. DOT Federal Motor Carrier Safety Regulations * * * ." The TLA believes that the certification does not accurately reflect the accompanying instructions stating that an "exempt" carrier "must certify that [it is] familiar with and will observe general operational safety fitness guidelines and applicable State and local laws relating to the safe operation of commercial motor vehicles." The TLA further commented that the safety certification mentioned in the instructions was originally authored by the ICC in response to comments filed by it in Ex Parte No. 55 (Sub-No. 94), Revision of Application Procedures and Corresponding Regulation, 10 ICC 2d 386, 398-399 (1994). The TLA commented that certification that a carrier who is exempt from the FMCSRs, "will observe" applicable Texas State Law is meaningless. The TLA believes that local law has no ability to influence a carrier's adherence to good highway safety practices beyond its extremely limited reach.

Carriers that are exempt from direct DOT oversight-because they operate smaller vehicles which generally operate only locally and do not pose a significant enough public threat to warrant Federal involvement-are nonetheless subject to State safety oversight. Many MCSAP States have not fully exempted smaller vehicles from their safety oversight and are not required to exempt them under MCSAP. Consistent with the Congressional mandate that safety is our highest priority, the FMCSA will require that OP-1(MX) applicants certify their willingness to inform themselves

concerning any State, local and tribal safety laws to which they are subject and to pledge to abide by them.

The Teamsters commented that instead of the check boxes on the form, we should require narratives describing systems and procedures that the applicant now uses or intends to use in the future. They contend that all applicants should be required to submit accident records with the applications and that "* * * (A)ny responsible carrier would have the information required to compile such a record at the time the application is prepared" even if it had not been maintaining an accident record as such. The TLA recommends that we require a narrative response about the content of an applicant's household goods arbitration program.

The FMCSA will evaluate information provided in the OP-1(MX) form and will conduct a safety audit of each carrier before deciding to grant provisional operating authority and allowing it to commence operations in the United States. Requests for additional narrative descriptions have been restricted to information necessary to evaluate an applicant's willingness and ability to comply with our safety standards and are not meant to be overly burdensome. The FMCSA will not burden Mexico-domiciled carriers with a requirement to provide a narrative description of their household goods arbitration programs because it is not critical to the safety mission of the agency and can be evaluated during the pre-authorization safety audit.

The Teamsters and Public Citizen commented that applicants should complete a proficiency exam testing their knowledge of the FMCSRs as a part of the application procedure, as allowed by MCSIA. The FMCSA does not find it necessary to require a proficiency exam at this time given the detailed require-

ments of this interim final rule. These detailed requirements include the application, including safety certifications, the pre-authorization safety audit, and the requirement in the Act that Mexico-domiciled commercial vehicles be inspected at each border crossing during the time they hold provisional authority and until they hold permanent authority for three consecutive years, unless the vehicles have a current CVSA inspection sticker affixed to the vehicle. Identifying the appropriate company individual to take the proficiency test would be problematic as well. In addition, it is not clear that a proficiency exam requirement would meaningfully enhance safety because it would only test the "proficiency" of a single carrier employee.

The Teamsters also commented that we should require financial reporting based on the Mexico-domiciled applicant's prior year revenue. Since the nature of a Mexico-domiciled carrier's business within Mexico may be unrelated to planned operations within the United States, that information might not be valid for the purpose of evaluating its fitness to operate within the United States. FMCSA also believes this suggestion is outside of the scope of this rulemaking and FMCSA jurisdiction.

Public Citizen believes the proposed application process for Mexico-domiciled trucks will not ensure compliance for several reasons. First, the SCT database to be used in evaluating a Mexico-domiciled carrier's safety fitness is "unpopulated" and "currently lacks the basic information necessary to process applications or to perform a safety review." It proposes as a precondition for granting operating authority that FMCSA set minimum levels of inspection, crash, and other performance and enforcement data to be amassed for an

applicant. For example, there must be sufficient data to calculate a score in Safestat(tm), the information system used to determine a domestic carrier's safety fitness. Public Citizen also believes that information reported on the form may be distorted through error or fraud, and the driver's safety records may not be available. It commented that insurance and proof of insurance requirements are dangerously inadequate to protect other drivers on public highways.

The SCT database inquiry is but one component of the planned safety evaluation of OP-1(MX) applicants. The FMCSA will use information in its own databases and will conduct a pre-authorization safety audit to validate an applicant's responses and assess its safety fitness. Furthermore, the insurance requirements for Mexico-domiciled carriers are identical to those applicable to domestic and Canadian carriers. Minimum levels of financial responsibility are set forth in 49 CFR part 387. The FMCSA will verify proof of financial responsibility during the pre-authorization safety audit. Furthermore, a Mexico-domiciled carrier will be unable to operate in the United States beyond the border zones unless evidence of adequate financial responsibility is filed with the FMCSA by an insurance company licensed in the United States. Evidence of insurance must also be maintained on the motor vehicle when operating within the United States and border inspectors will verify proof of financial responsibility electronically by checking the FMCSA's insurance database.

The CTA commented that applicants should file proof of insurance with the application, rather than after FMCSA grants the applicant operating authority. Current 49 CFR part 387 requires the insurer, not the

applicant, to make insurance filings with the FMCSA. This requirement allows insurance companies to retain control of the insurance certification documents, thereby significantly decreasing opportunities for fraudulent activity. Section 350(a)(8) of the Act, however, requires the FMCSA to verify proof of financial responsibility with a financial responsibility provider licensed in the United States during the pre-authorization safety audit. Although FMCSA will independently verify a Mexico-domiciled motor carrier applicant's proof of financial responsibility during the pre-authorization audit, the carrier will not have been issued a DOT number under which a filing may be made. Therefore, we will not require actual filing of the insurance at the time of the audit. However, once the carrier is granted provisional operating authority, it must have evidence of acceptable insurance on file with the FMCSA before it may operate within the United States.

A number of parties, including OOIDA, Public Citizen, and the Teamsters, urged that Mexico-domiciled motor carriers should not be allowed to operate beyond the border zones at this time, citing what they view as an inadequate Mexican Government motor carrier safety infrastructure, inadequate inspection facilities at border crossings, and other factors. The Teamsters, for example, note that for these reasons full implementation of NAFTA's motor carrier access provisions is premature and urge FMCSA to "postpone the border opening."

FMCSA believes that the regulations being published today, and the other safety measures the agency is taking with respect to Mexico-domiciled motor carriers operating outside the border zone, will give the agency sufficient assurance that these carriers are

capable of complying with U.S. safety standards, notwithstanding any shortcomings in the Mexican Government's motor carrier safety infrastructure. FMCSA also believes that, in conjunction with its State partners, it will be able to maintain an adequate safety inspection program at the border. It should be noted, however, that these and other comments urging a delay in the implementation of NAFTA assume that the regulations published today "open the border" or lift the current moratorium on the granting of operating authority. The regulations do neither. The President, not the FMCSA, has that authority pursuant to 49 U.S.C. 13902. The President has announced that the United States will comply with its NAFTA obligations regarding Mexico-domiciled motor carrier access in a manner that will not weaken motor carrier safety. The regulations help ensure motor carrier safety in anticipation of presidential action lifting the moratorium.

In addition, section 350(c)(1) of the Act requires the DOT Inspector General (OIG) to conduct a comprehensive review of FMCSA border operations before the FMCSA may spend any Federal funds to review or act on OP-1(MX) applications. The OIG must assess whether the statutory requirements have been met to ensure the opening of the border does not pose an unacceptable safety risk to the American public. Section 350(c)(2) also requires the Secretary of Transportation to certify in writing in a manner addressing the Inspector General's findings that the opening of the border does not pose an unacceptable safety risk to the American public before the FMCSA may spend any Federal funds to review or act on OP-1(MX) applications.

ABA and Greyhound urge that we not implement our motor carrier-related NAFTA obligations until Mexico reciprocates by implementing its motor carrier-related NAFTA obligations. Again, none of the regulations published today "open the border" or lift the current moratorium on the grant of operating authority. In any event, NAFTA itself provides procedures to ensure that each party fulfills its obligations under the Agreement.

In response to comments about the need for ensuring that vehicles operated by Mexico-domiciled motor carriers comply with the applicable Federal Motor Vehicle Safety Standards (FMVSS), we note that enforcement of these safety standards by FMCSA and its State partners will be accomplished through roadside inspections, including inspections at the border. Roadside inspections provide a means of ensuring that vehicles meet the applicable FMVSSs in effect on the date the vehicle was manufactured.

Title 49 CFR part 393 of the FMCSRs currently includes cross-references to most of the FMVSSs applicable to heavy trucks and buses. The rules require that motor carriers operating in the United States, including Mexico-domiciled carriers, must maintain the specified safety equipment and features that the National Highway Traffic Safety Administration (NHTSA) requires vehicle manufacturers to install. Failure to maintain these safety devices or features is a violation of the FMCSRs. If the violations are discovered during a roadside inspection, and they are serious enough to meet the current out-of-service criteria used in roadside inspections (i.e., the condition of the vehicle is likely to cause an accident or cause a mechanical breakdown), the vehicle would be placed out of service until

the necessary repairs are made. The FMCSA also has the option of imposing civil penalties for violations of 49 CFR part 393. Any FMVSS violations that involve noncompliance with the standards presently incorporated into part 393 could subject motor carriers to a maximum civil penalty of $10,000 per violation. If the FMCSA determines that Mexico-domiciled carriers are operating vehicles that do not comply with the applicable FMVSSs, this information could be used to take appropriate enforcement action for making a false certification on the application for operating authority.

The FMCSA and NHTSA are initiating several regulatory actions (published elsewhere in today's Federal Register) to ensure that labeling requirements of the FMVSSs are enforced against motor vehicles entering the United States. The FMCSA is proposing to amend the FMCSRs to require that all motor carriers ensure that their CMVs have a certification label that meets the requirements of 49 CFR part 567, applied by the vehicle manufacturer or by a registered importer. United States motor carriers typically would only have access to vehicles that meet the applicable FMVSSs and have a certification label that meets the requirements of 49 CFR part 567, but Mexico-domiciled and Canada-domiciled carriers purchasing vehicles for operation within their respective countries may be using vehicles which have not been certified as FMVSS-compliant.

The FMCSA is proposing that U.S. motor carriers comply with the certification label proposal on the effective date of the FMVSS certification rule. The agency is also proposing that foreign motor carriers that begin operations in the United States on or after the effective date of the certification label rule, or

expand their operations to go beyond the border zones for the first time, ensure that all CMVs used in the new or expanded operations have the necessary certification label before entering the United States. All other Canada and Mexico-domiciled motor carriers operating in the United States prior to the effective date of the interim final rule would be allowed 24 months to bring their vehicles into compliance with the certification requirements.

NHTSA is taking three separate actions relating to the certification label. The first action is publication of a policy statement that addresses commercial motor vehicles that were not originally manufactured for sale in the United States, and thus were not required at the time of manufacture to be certified as complying with the FMVSSs, but are subsequently sought to be imported into the United States. The statement provides that a vehicle manufacturer may, if it has sufficient basis for doing so, retroactively apply a label to a commercial motor vehicle certifying that the vehicle complied with all applicable FMVSSs in effect at the time it was originally manufactured.

NHTSA recognizes that there are many commercial motor vehicles used by motor carriers in Mexico and Canada that were manufactured in accordance with the FMVSSs, but were not certified as complying with those standards because the vehicles were manufactured for sale in Canada or Mexico. NHTSA is proposing two additional actions related to the FMVSS and foreign-domiciled motor carriers. The first would establish recordkeeping requirements for foreign manufacturers that retroactively certify vehicles. The second would codify, in 49 CFR Part 591, its longstanding interpretation of the term "import," as used in

the National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563, to include bringing a commercial motor vehicle into the United States for the purpose of transporting cargo or passengers.

Discussion of the Interim Final Rule

The FMCSA has made changes in this interim final rule to the proposed revisions to part 365, based on the comments, section 350 of the 2002 DOT Appropriations Act, and our own review of the proposal.

Section 365.503 has been revised to allow both hard copy and electronic submission of required information on designation of process agents (Form BOC- 3) as part of the application process. The FMCSA currently allows only process agent services to electronically file the Form BOC-3. If a carrier elects to use a process agent service, it must include a letter to that effect with the Form OP-1(MX) and ensure that the service electronically files the Form BOC-3 with the FMCSA. Otherwise, the hard copy Form BOC-3 must accompany the application. The carrier may not begin operations until the Form BOC-3 has been filed with the FMCSA.

Section 365.505 has been revised to extend to 18 months the deadline for filing Form OP-1(MX) by carriers holding a Certificate of Registration issued before April 18, 2002, authorizing operations beyond the municipalities along the U.S.-Mexico border and beyond the commercial zones of such municipalities. These carriers, as well as those carriers who filed the previous version of the OP-1(MX) application form, do not need to submit another fee when filing a new OP-1(MX) application. The FMCSA may suspend or

revoke the Certificate of Registration of any carrier that fails to comply with this re-registration requirement and 18-month deadline. Certificates of Registration issued before April 18, 2002, will remain valid until the FMCSA acts on the newly submitted OP-1(MX) application.

The FMCSA has revised the heading of § 365.507 in both the table of sections and the regulatory text to "FMCSA action on the application" to accurately reflect how the FMCSA will consider and act on each application. The section now provides that the FMCSA will validate all data and certifications in an application with information in its own databases, in the appropriate databases of the Mexican Government to which it has access as part of the NAFTA implementation process, and with information discovered during a pre-authorization safety audit. The FMCSA will grant provisional operating authority if it determines that the application and the results of the safety audit are consistent with the FMCSA's safety fitness policy. The safety fitness criteria published in new Appendix A to part 365 for the pre-authorization safety audit is similar to the safety fitness criteria for post-operational safety audits for Mexico-domiciled carriers in new Appendix A to part 385 that is being published elsewhere in today's Federal Register. We will also assign a distinctive USDOT Number that distinguishes the carrier as a Mexico-domiciled carrier authorized to operate beyond the border zones.

In the companion rule establishing a safety monitoring system for new entrant Mexico-domiciled carriers (published elsewhere in today's Federal Register), FMCSA will require commercial motor vehicles to have a valid CVSA inspection decal denoting a successful

inspection of the commercial motor vehicle at all times while operating under provisional operating authority in the United States beyond the border zones. Provisional authority to operate beyond the border zones cannot become permanent for at least 18 months, until the carrier has successfully completed an 18-month safety monitoring program, including a compliance review resulting in the assignment of a Satisfactory safety rating as required by § 350(a)(2) of the 2002 DOT Appropriations Act.

Section 365.511 has been added in response to the 2002 DOT Appropriations Act. This section will require that a Mexico-domiciled carrier must continue to seek out and have CVSA inspectors perform CVSA Level I inspections for the first three consecutive years after being granted permanent operating authority.

We have made conforming amendments to §§ 365.101(h) and 365.105(a). We revised § 365.101(h) to reflect the expanded scope of operations authorized by the Form OP-1(MX)—from Mexico to all points in the United States. The previous reference to the four border States was originally designed to register applicants to operate from Mexico to points only within the border States of California, Texas, Arizona and New Mexico.

There are three revisions to § 365.105(a). First, we have specified that household goods carriers and motor passenger carriers are required to submit the OP-1(MX) when applying to operate within the United States beyond the border zones. The previous regulations generally required motor property carriers to use the form. Next, we removed an obsolete reference to Form OP-1(W) because we do not have authority to register water carriers. Finally, we updated the cross-

reference to filing fee requirements to reflect the recodification of these requirements in 49 CFR part 360.

Revisions to Form OP-1(MX)

The interim final rule reflects numerous typographical corrections and adjustments to the OP-1(MX) application form to make it consistent with the OP-2 form. All requests for supplemental information that must accompany the application are in bold typeface so that they are conspicuous to the applicant. The substantive revisions are discussed below.

The OP-1(MX) application instructions have been revised to discontinue the requirement that applicants submit Internal Revenue Service (IRS) Form 2290, Schedule 1 (Schedule of Heavy Highway Vehicles) with the OP-1(MX) application. Unlike the OP-1(MX) application procedure, taxes imposed by 26 U.S.C. 4481 are assessed annually. The IRS Form 2290 would only provide evidence of compliance for the current year. However, the applicant must still certify compliance with 26 U.S.C. 4481 under Section VIII of the application.

The instructions clarify the definition of "applicant" for purposes of determining who must sign the various certifications and the Section IX—Application Oath.

Next, applicants are cautioned to enter only the city code and telephone numbers when listing Mexican telephone numbers on the form because previous applicants often submitted invalid or incomplete telephone numbers.

Under the Insurance Instructions, we emphasize that although evidence of coverage is not required at the time the application is submitted, a carrier has up 90 days after filing an OP-1(MX) application to submit proof of financial responsibility.

The information on how to receive additional assistance in completing the Forms OP-1(MX) and MCS-150 was revised to list a toll-free telephone number accessible from Mexico. We also updated the information for obtaining assistance with hazardous materials registration procedures and regulations.

The instructions also state that applicants that use a process agent service to designate multiple agents for service of process must attach a letter to the application informing the FMCSA of this option. The applicant must also ensure that the service electronically files the Form BOC-3 with the FMCSA within 90 days after submitting the application. The applicant is also notified that it may not begin operations in the United States until the Form BOC-3 has been filed with FMCSA.

The FMCSA has modified Section IA to add a question asking applicants whether they previously held provisional operating authority that was revoked. If that is the case, the applicant must show how it has corrected the deficiencies that resulted in the revocation, explain what effectively functioning basic safety management systems it now has in place, and provide any information and documents that support its arguments.

The FMCSA has corrected references in Section IA, and in the corresponding instructions, to an "SCT registration number." An applicant must be registered

with SCT to be issued operating authority. However, the SCT does not issue an SCT registration number. It uses the RFC number, a Mexican Federal Taxpayer Registration identifier issued by a separate Government agency, to track the carrier's information in the SCT database. A company is issued a Registro Federal de Contribuyente; individuals are issued a Registro Federal de Causante. The applicant must complete Question 5a under Section IA based upon the applicant's form of business: (1) if the applicant is a sole proprietorship, enter the Registro Federal de Causante; (2) all other business forms should complete Question 5a using the Registro Federal de Contribuyente.

We have deleted a redundant question regarding the applicant's domicile from Section IA and Ownership and Control information from Section II. This information was used to substantiate claims that a carrier was U.S.-owned or controlled and therefore eligible to operate beyond the border zones under a Certificate of Registration. With the implementation of NAFTA's access provisions, Mexico-domiciled carriers applying to operate beyond the border zones will no longer file the OP-2 form. They must file an OP-1(MX), and ownership and control information will not be the basis for granting authority

Several safety certifications have been modified or added to Section V. The safety certification for applicants that are exempt from the Federal Motor Carrier Safety Regulations because of the weight of their vehicles and because they will not transport hazardous materials (as was discussed in the proposed form instructions but inadvertently omitted from the proposed form) has been restored. These applicants must

certify that they will observe safe operating practices and comply with applicable State, local and tribal safety laws.

Under Driver Qualifications, applicants must certify, consistent with 49 CFR 391.23, that they will investigate their drivers' 3-year employment and driving histories. The certification statement concerning the need for carriers to establish a system and instructions for drivers to report criminal convictions has been removed. Current regulations only require domestic drivers to report violations of motor vehicle traffic laws and ordinances. The certification statement relating to the use of properly licensed drivers has been modified to require that the driver's Licencia Federal de Conductor be registered in the SCT database.

The four certification statements proposed under certification section V.8, pertaining to requirements that must be in place once operations within the United States have begun, have been modified to emphasize that they are post-operational requirements and have been integrated into the Hours of Service, Driver Qualifications, and Vehicle Condition certification sections, as appropriate.

In response to comments from the ATA, Teamsters, OOIDA, and the TTD, we have extensively revised the Hazardous Materials (HM) and Cargo Tank certification statements. The HM training certification was modified to cite the relevant HM training regulations (49 CFR part 172, subpart H and 49 CFR 177.816) and the specific hazardous materials safety compliance information that must accompany the application.

We reworded the certification statement regarding the establishment of a system and procedures for

inspecting, repairing and maintaining "vehicles for HM transportation in a safe condition." The Hazardous Materials Regulations (HMR) require a system and procedures for inspection, repair and maintenance of reusable hazardous materials packages in a safe condition. The vehicle inspection, repair and maintenance requirement is covered in the Vehicle Condition certification statements.

We added a new certification statement requiring carriers to ensure that all HM vehicles are marked and placarded in compliance with 49 CFR part 172, subparts D and F.

The HM registration certification statement, which is not restricted to Cargo Tank carriers, has been corrected and moved to the Hazardous Materials section.

The Section VIII—Compliance Certification statement concerning process agent(s) has been modified to replace the phrase "judicial filings and notices" with "filings and notices." Two new Compliance Certification statements have been added. In the first, responsive to section 350(a)(5) of the DOT Appropriations Act, the applicant must certify it is willing and able to have all vehicles operated in the United States inspected at least every 90 days by a certified CVSA inspector and have decals affixed attesting to satisfactory compliance with Level I CVSA Inspection criteria. This provision will require a Mexico-domiciled motor carrier to seek out a qualified CVSA inspector to conduct a CVSA inspection at least every 90 days until it has operated under permanent authority for at least 3 consecutive years. Mexico-domiciled carriers should seek out and have Mexico-domiciled CVSA inspectors perform such inspections in Mexico before the carrier sends its vehicles to United States ports of entry. This will help

the carriers to minimize disruptions to the efficient use of their vehicles, minimize time in the U.S. ports of entry, and provide a more efficient border crossing enroute to its U.S. and Canadian destinations.

The second compliance certification added to Section VIII is designed to ensure that Mexico-domiciled carriers whose registration has been suspended or revoked are not reapplying for operating authority while under suspension or sooner than 30 days after the date of revocation, as prohibited in part 385 subpart B. A signature line also has been placed beneath the Compliance Certification statements, consistent with Section V—Safety Certifications and Section VI—Household Goods Arbitration Certifications.

Certain other changes were made to the Section VIII—Compliance Certifications after discussions with the U.S. Department of Labor and the U.S. Environmental Protection Agency. The proposed Form OP-1(MX) included a certification that the applicant is willing and able to comply with U.S. labor laws. Although the certification is included in a section that is prefaced by the direction "All applicants must certify as follows:", the instructions for the form, after first stating that FMCSA considered compliance with labor laws to be "extremely important," then indicated that "registration will not be withheld based solely on the failure by an applicant to certify that it is willing and able to comply with such [DOL and OSHA] requirements * * *." The FMCSA has removed those certification statements and the accompanying instructions. We have added new language that compliance with all pertinent Federal, State, local and tribal statutory and regulatory requirements, including labor and environmental laws, is mandatory. Such compliance

includes producing requested records for review and inspection, and that inspectors of the Immigration and Naturalization Service at the port of entry must determine the driver of the vehicle meets the requirements under the Immigration and Nationality Act. The statements do not require certification—they are informational in nature—and thus have been placed after the signature line.

The Filing Fee Policy and Computation Box that formerly appeared in the form instructions have been moved to the back of the form because a carrier cannot provide filing fee information until completing Section III—Types of Registration. The fee policy also discloses that the FMCSA will place a 30-day hold on the application if the filing fee payment is made by personal check.

Finally, FMCSA will translate the form and instructions into Spanish to help applicants understand what each question asks and what types of answers they need to provide.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and Department of Transportation Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979) because of public interest. It has been reviewed by the Office of Management and Budget under Executive Order 12866. However, it is anticipated that the

economic impact of the revisions in this rulemaking will be minimal. The new or revised Form OP-1(MX) is intended to foster and contribute to safety of operations, adherence to U.S. law and regulations, and compliance with U.S. insurance and tax payment requirements on the part of Mexico-domiciled carriers.

Nevertheless, the subject of safe operations by Mexico-domiciled carriers in the United States has generated considerable public interest within the meaning of Executive Order 12866. The manner in which the FMCSA carries out its safety oversight responsibilities with respect to this international motor carrier transportation has been of substantial interest to the domestic motor carrier industry, the Congress, and the public at large. The 2002 DOT Appropriations Act includes specific requirements FMCSA must complete to begin reviewing and processing the application Form OP-1(MX) under this interim final rule.

The Regulatory Evaluation analyzes the costs and benefits of this rule and the two companion NAFTA-related rules published elsewhere in today's Federal Register. Pursuant to Executive Order 12866, because these rules are so closely interrelated, we did not attempt to prepare separate analyses for each rule.

The evaluation estimated costs and benefits based on three different scenarios, with a high, low and medium number of Mexico-domiciled carriers assumed covered by the rules. The costs of these rules are minimal under all three scenarios. Over 10 years, the costs range from $53 million for the low scenario to approximately $76 million for the high scenario. Forty percent of these costs are borne by the FMCSA, while the remaining costs are paid by Mexico-domiciled carriers. The largest costs are those associated with conducting pre-

authorization safety audits, compliance reviews within 18-months of a carrier's receiving provisional operating authority, and the loss of a carrier's ability to operate in the United States.

The FMCSA used the cost effectiveness approach to determine the benefits of these rules. This approach involves estimating the number of crashes that would have to be deterred in order for the proposals to be cost effective. Over 10 years, the low scenario would have to deter 640 forecast crashes to be cost beneficial, the medium scenario would have to deter 838, and the high scenario would have to deter 929. While the overall number of crashes to be avoided under the medium and high scenario is fairly high, the number falls rapidly over the 10-year analysis period and beyond. The tenth year deterrence rate is one-quarter to one-sixth the size of the first year's rate.

A copy of the Regulatory Evaluation is in the docket for this rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (Pub. L. 96-354, 5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement and Fairness Act (Pub. L. 104-121), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The United States did not have in place a special system to ensure the safety of Mexico-domiciled carriers operating in the United States. Mexico-domiciled

carriers will be subject to all the same safety regulations as domestic carriers. However, FMCSA's enforcement of the FMCSRs has become increasingly data dependent in the last several years. Several programs have been put in place to continually analyze crash rates, out-of-service rates, compliance review records, and other data sources to allow the agency to focus on high- risk carriers. This strategy is only effective if the FMCSA has adequate data on carriers' size, operations, and history. Thus, a key component of this rule and the companion application rule for border-zone carriers is the requirement that Mexico-domiciled carriers operating in the United States must complete a Form MCS-150-Motor Carrier Identification Report, and must update their Form OP-1(MX)—Application to Register Mexican Carriers for Motor Carrier Authority To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border or Form OP-2—Application for Mexican Certificate of Registration for Foreign Motor Carriers and Foreign Motor Private Carriers Under 49 U.S.C. 13902 when their situation changes. This will allow the FMCSA to better monitor these carriers and to quickly determine whether their safety or out-of- service record changes.

The more stringent oversight procedures established in our safety monitoring interim final rule, RIN 2126-AA35, will also allow the FMCSA to respond more quickly when safety problems emerge. Required safety audits, compliance reviews and CVSA inspections will provide the FMCSA with more detailed information about Mexico-domiciled carriers, and allow the FMCSA to act appropriately upon discovering safety problems.

The objective of these rules is to help ensure the safe operation of Mexico-domiciled carriers in the United

States. The rules describe what additional information Mexico-domiciled carriers will have to submit, and outline the procedure for dealing with possible safety problems.

The safety monitoring system, the safety certifications and other information to be submitted in the OP-1(MX) and OP-2 applications, and the pre-authorization safety audit are means of ensuring that: (1) Mexico-domiciled applicants are sufficiently knowledgeable about safety requirements before commencing operations (a prerequisite to being able to comply); and (2) their actual operations in the United States are conducted in accordance with their application certifications and the conditions of their registrations.

These rules will primarily affect Mexico-domiciled small motor carriers who wish to operate in the United States. The amount of information these carriers will have to supply to the FMCSA has been increased, and we estimate that they will spend two additional hours gathering data for the OP-1(MX) and OP-2 application forms. Mexico-domiciled carriers subject to this rule will also have to undergo pre-authorization safety audits and demonstrate continuous compliance with motor vehicle safety standards by undergoing compliance reviews and displaying valid CVSA inspection decals on their vehicles. We presented three growth scenarios in the regulatory evaluation: A high option, with 11,787 Mexico-domiciled carriers in the baseline; a medium scenario, with 9,500 Mexico-domiciled carriers in the baseline; and a low scenario, with 4,500 Mexico-domiciled carriers in the baseline. Under all three options, the FMCSA believes that the number of applicants will match approximately that observed in

the last few years before this publication date, approximately 1,365 applicants per year.

A review of the Motor Carrier Management Information System census file reveals that the vast majority of Mexico-domiciled carriers are small, with 75 percent having three or fewer vehicles. Carriers at the 95th percentile had only 15 trucks or buses.

These rules should not have any impact on small U.S.-based motor carriers.

The Regulatory Evaluation includes a description of the recordkeeping and reporting requirements of these rules. Applicants filing both the OP-1(MX) and OP-2 will also have to submit the Form MCS-150 and the Form BOC-3-Designation of Agent for Service of Process. In addition, Mexico-domiciled carriers will have to notify the FMCSA of any changes to certain information.

The MCS-150 is approximately two pages long. In addition to requiring basic identifying information, it requires that carriers state the type of operation they run, the number of vehicles and drivers they use, and the types of cargo they haul. The BOC-3 form merely requires the name, address and other information for a domestic agent to receive legal notices on behalf of the motor carrier. The rules also include other modest changes in the OP-1(MX) and OP-2 forms.

None of these forms require any special expertise to complete. Any individual with knowledge about the operations of a carrier should be able to fill out these forms.

The FMCSA is not aware of any other rules that duplicate, overlap with, or conflict with these rules.

The FMCSA did not establish any different requirements or timetables for small entities. As noted above, we do not believe these requirements are onerous. Most covered carriers will be required to spend two extra hours to complete the relevant forms, undergo a safety audit and a compliance review or one safety audit (depending on the type of authority they apply for) at four to six hours each and display a valid CVSA inspection decal. The part 385 rule would not achieve its purposes if small entities were exempt. In order to ensure the safety of Mexico-domiciled carriers, the rule must have a consistent procedure for addressing safety problems. Exempting small motor carriers (which, as was noted above, are the vast majority or Mexico-domiciled carriers who would operate in the United States) would defeat the purpose of these rules.

The FMCSA did not consolidate or simplify the compliance and reporting requirements for small carriers. Small U.S.-based carriers already have to comply with the paperwork requirements in part 365. There is no evidence that domestic carriers find these provisions confusing or particularly burdensome. Apropos the part 385 provisions, we believe the requirements are fairly straightforward, and it would not be possible to simplify them. A simplification of any substance would make the rule ineffectual. Given the compelling interest in guaranteeing the safety of Mexico-domiciled carriers operating in the United States, and the fact that the majority of these carriers are small entities, no special changes were made.

Therefore, the FMCSA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of $100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. The FMCSA has determined that the changes effected by this rulemaking would not have an impact of $100 million or more in any one year. The Federal Government reimburses inspectors, funds facilities, and provides support through the MCSAP grant program.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice

Reform, to minimize litigation, eliminate ambiguity and reduce burden.

Executive Order 13045 (Protection of Children)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that also concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children.

The agency has determined that this rule is not a "covered regulatory action" as defined under Executive Order 13045. First, this rule is not economically significant under Executive Order 12866 because the FMCSA has determined that the changes in this rulemaking would not have an impact of $100 million or more in any one year. The costs range from $53 to $76 million over 10 years. Second, the agency has no reason to believe that the rule would result in an environmental health risk or safety risk that would disproportionately affect children. Mexico-domiciled motor carriers who intend to operate commercial motor vehicles anywhere in the United States must comply with current U.S. Environmental Protection Agency regulations and other United States environmental laws under this rule and others being published elsewhere in today's Federal Register. Further, the agency has conducted a programmatic environmental assessment

as discussed later in this preamble. While the PEA did not specifically address environmental impacts on children, it did address whether the rule would have environmental impacts in general. Based on the PEA, the agency has determined that the proposed rule would have no significant environmental impacts.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under E. O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999 (64 FR 43255, August 10, 1999). The FMCSA has determined that this action would not have significant Federalism implications or limit the policymaking discretion of the States.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217 Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Executive Order 13166 (Limited English Proficiency)

Executive Order 13166, Improving Access to Services for Persons With Limited English Proficiency, requires each Federal agency to examine the services it

provides and develop reasonable measures to ensure that persons seeking government services but limited in their English proficiency can meaningfully access these services consistent with, and without unduly burdening, the fundamental mission of the agency. The FMCSA plans to provide a Spanish translation of the form OP-1(MX) application and instructions. We believe that this action complies with the principles enunciated in the Executive Order.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FMCSA has determined that this proposal would impact a currently approved information collection, OMB No. 2126-0016.

The information collection requirements of Form OP-1(MX) have been approved by the OMB under the control number 2126-0016, titled "Revision of Licensing Application Forms, Application Procedures, and Corresponding Regulations." This approval includes forms OP-1(MX), OP-1(P), OP-1(FF), and OP-1 and totals 40,060 burden hours. Of that amount, 2,060 annual burden hours was estimated as the OP-1(MX) baseline (1,030 respondents per year @ 2 hours each to complete the form).

Carriers anticipating that the moratorium on new grants of operating authority to Mexico-domiciled carriers would be lifted filed 190 applications, but soon ceased to file applications when it became evident that

the forms were not being processed due to a delay in implementing the NAFTA agreement. For this reason, OP-1(MX) filings fell well below the 1,000 respondent estimate.

Revisions to OP-1(MX) Baseline: A PRA review normally involves determining the information collection impacts of a rulemaking, comparing those impacts with the current regulation (baseline) and measuring the resulting change. The FMCSA finds it necessary to amend the baseline (1) to be consistent with updated demographic data on Mexico-domiciled carriers from the PEA and Regulatory Flexibility Analysis to this rule, and (2) to take into account an imminent Presidential action that is not subject to PRA review-the issuance of a Presidential Order lifting the moratorium on grants of operating authority to Mexico-domiciled motor carriers to operate within the United States beyond the border zones. The Regulatory Evaluation to this rule projects a high, medium and low estimate for the number of Mexico-domiciled carriers now operating within the United States. The PRA review is based on the medium estimate of 9,500 active carriers. Therefore, the revised baseline assumes that the moratorium is lifted and that Mexico-domiciled carriers are filing the existing OP-1(MX) application form. The agency is revising the form title to "Application to Register Mexican Carriers for Motor Carrier Authority To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border."

The FMCSA estimates that 5,108 Mexico-domiciled carriers will request OP-1(MX) operating authority in year one (includes half of the 9,500 active Mexico-domiciled carriers (4,750) plus 25 percent of 1,430 new applicants (358)), and 358 Mexico-domiciled carriers will

apply in subsequent years. The existing form takes approximately 2 hours to complete. Since Mexico-domiciled carriers currently are not required to update carrier identification information, there would be zero updates received in year one and subsequent years. The revised baseline is calculated as follows:

OP-1(MX) filings (year one): 10,216 hours [5,108 x 2 hours per form]

OP-1(MX) filings (subsequent years): 716 hours [358 x 2 hours per form]

The revised baseline results in the following annual burden hour estimate for control no. 2126- 0016:

Year One: 48,216 hours [38,000 + 10,216]

Subsequent Years: 38,358 [38,000 + 358]

Impact of the interim final rule. This action proposes to amend 49 CFR part 365 and revise Form OP-1(MX). Under the amended regulations, Mexico-domiciled motor carriers seeking to operate within the United States beyond the border zones, including carriers that previously filed pending Form OP-1(MX) applications, would be required to submit the revised Form OP-1(MX). Under the revised Form OP-1(MX), the FMCSA will collect more detailed information on an applicant motor carrier's size, operations, and history than can be collected using the current form. In addition, all grants of operating authority issued under the revised form would be conditioned upon the carrier's successful completion of a pre-operational safety audit and an 18-month safety monitoring program (established in an interim final rule published elsewhere in today's Federal Register), including a compliance review. For these reasons, the FMCSA anticipates that

the number of carriers would be lower than the revised baseline. The FMCSA estimates that 5,091 Mexico-domiciled carriers would apply for OP-1(MX) authority in year one, and 341 carriers thereafter. Due to the additional information requested on the form, the FMCSA estimates that it will take 4 hours to complete.

The FMCSA must be notified in writing of certain key changes in the information on the form within 45 days of the change. For changes and updates, the agency anticipates that annually approximately one quarter of those granted authority will update their applications. It will take approximately 30 minutes to complete the updates. For simplicity's sake, we based the number of individuals granted authority on the estimated total number of first-year applicants.

OP-1(MX) Updates/Changes:

(In year one): 1,273 = (5,091 x .25 = 1272.75 rounded)

(In subsequent years): 1,358 (5,091 + 341 = 5,432 x .25)

Therefore, the FMCSA estimates that the interim final rule will adjust the annual burden hour estimate for the OP-1(MX) as follows:

Mexico-domiciled carrier filings of the Form OP-1(MX):

(In first year): 20,364 hours [5,091 x 4 hours per form]

(In subsequent years): 1,364 hours [341 x 4 hours per form]

Updates/Changes:

(In first year): 1,273 x .50 hour per form = 637 hours (rounded)

(In subsequent years): 1,358 x .50 hour per form = 679 hours

The total burden hours for this information collection in the first year is 59,001 hours [(38,000 hours + 20,364 hours + 637 hours)] and in subsequent years is 40,043 hours [38,000 hours + 1,364 hours + 679 hours].

OMB Control Number: 2126-0016

Title: Revision of Licensing Application Forms, Application Procedures, and Corresponding Regulations.

Respondents: Mexico-domiciled motor carriers.

Estimated Annual Hour Burden for this Interim Final Rule: Year 1 = 59,001 hours; Subsequent years = 40,043 hours.

You may submit any additional comments on the information collection burden addressed by this interim final rule to the Office of Management and Budget (OMB). The OMB must receive your comments by April 18, 2002. You must mail or hand deliver your comments to: Attention: Desk Officer for the Department of Transportation, Docket Library, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, NW., Washington, DC 20503.

National Environmental Policy Act

The FMCSA is a new administration within the Department of Transportation (DOT). The FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). We expect the draft FMCSA Order to appear in the Federal Register for public comment in the near future. The framework of the FMCSA Order is consistent with and reflects the procedures for con-

sidering environmental impacts under DOT Order 5610.1C. FMCSA has analyzed this rule under the NEPA and DOT Order 5610.1C, and has issued a Finding Of No Significant Impact (FONSI). The FONSI and the environmental assessment are in the docket to this rule.

List of Subjects in 49 CFR Part 365

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Motor carriers, Moving of household goods, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the FMCSA amends 49 CFR part 365 as follows:

PART 365—RULES GOVERNING APPLICATIONS FOR OPERATING AUTHORITY

1. The authority citation for part 365 is revised to read as follows:

Authority: 5 U.S.C. 553 and 559; 16 U.S.C. 1456; 49 U.S.C. 13101, 13301, 13901-13906, 14708, 31138, and 31144; 49 CFR 1.73.

2. In § 365.101, revise paragraph (h) to read as follows:

§ 365.101 Applications governed by these rules.

* * * * *

(h) Applications for Mexico-domiciled motor carriers to operate in foreign commerce as common, contract or private motor carriers of property (including exempt items) between Mexico and all points in the United States. Under NAFTA Annex I, page I-U-20, a Mexico-domiciled motor carrier may not provide point-to-point transportation services, including express delivery services, within the United States for goods other than international cargo.

3. In § 365.105, revise paragraph (a) to read as follows:

§ 365.105 Starting the application process: Form OP-1.

(a) All applicants must file the appropriate form in the OP-1 series, effective January 1, 1995. Form OP-1 for motor property carriers and brokers of general freight and household goods; Form OP-1(P) for motor passenger carriers; Form OP-1(FF) for freight forwarders of household goods; and Form OP-1(MX) for Mexico-domiciled motor property carriers, including household goods and motor passenger carriers. A separate filing fee in the amount set forth at 49 CFR 360.3(f)(1) is required for each type of authority sought in each transportation mode.

* * * * *

4. Add a new subpart E to part 365 to read as follows:

Subpart E—Special Rules for Certain Mexico-Domiciled Carriers

Sec.

Subpart E—Special Rules for Certain Mexico-domiciled Carriers

§ 365.501 Scope of rules.

(a) The rules in this subpart govern the application by a Mexico-domiciled motor carrier to provide transportation of property or passengers in interstate commerce between Mexico and points in the United States beyond the municipalities and commercial zones along the United States-Mexico international border.

(b) A Mexico-domiciled carrier may not provide point-to-point transportation services, including express delivery services, within the United States for goods other than international cargo.

§ 365.503 Application.

(a) Each applicant applying under this subpart must submit an application that consists of:

(1) Form OP-1 (MX)—Application to Register Mexican Carriers for Motor Carrier Authority To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border;

(2) Form MCS-150—Motor Carrier Identification Report; and

(3) A notification of the means used to designate process agents, either by submission in the application package of Form BOC-3—Designation of Agents-Motor Carriers, Brokers and Freight Forwarders or a letter stating that the applicant will use a process agent service that will submit the Form BOC-3 electronically.

(b) The Federal Motor Carrier Safety Administration (FMCSA) will only process your application if it meets the following conditions:

(1) The application must be completed in English;

(2) The information supplied must be accurate, complete, and include all required supporting documents and applicable certifications in accordance with the instructions to Form OP-1 (MX), Form MCS-150, and Form BOC-3;

(3) The application must include the filing fee payable to the FMCSA in the amount set forth at 49 CFR 360.3(f)(1); and

(4) The application must be signed by the applicant.

(c) You must submit the application to the address provided in Form OP-1(MX).

(d) You may obtain the application forms from any FMCSA Division Office or download it from

the FMCSA website at: http://www.fmcsa.dot.gov/factsfigs/formspubs.htm.

§ 365.505 Re-registration and fee waiver for certain applicants.

(a) If you filed an application using Form OP-1(MX) before May 3, 2002, you are required to file a new Form OP-1(MX). You do not need to submit a new fee when you file a new application under this subpart.

(b) If you hold a Certificate of Registration issued before April 18, 2002, authorizing operations beyond the municipalities along the United States-Mexico border and beyond the commercial zones of such municipalities, you are required to file an OP-1(MX) if you want to continue those operations. You do not need to submit a fee when you file an application under this subpart.

(1) You must file the application by November 4, 2003.

(2) The FMCSA may suspend or revoke the Certificate of Registration of any applicable holder that fails to comply with the procedures set forth in this section.

(3) Certificates of Registration issued before April 18, 2002, will remain valid until the FMCSA acts on the OP-1(MX) application.

§ 365.507 FMCSA action on the application.

(a) The FMCSA will review and act on each application submitted under this subpart in accordance with the procedures set out in this part.

(b) The FMCSA will validate the accuracy of information and certifications provided in the application by

checking data maintained in databases of the governments of Mexico and the United States.

(c) Pre-authorization safety audit. Every Mexico-domiciled carrier that applies under this part must satisfactorily complete an FMCSA-administered safety audit before FMCSA will grant provisional operating authority to operate in the United States. The safety audit is a review by the FMCSA of the carrier's written procedures and records to validate the accuracy of information and certifications provided in the application and determine whether the carrier has established or exercises the basic safety management controls necessary to ensure safe operations. The FMCSA will evaluate the results of the safety audit using the criteria in Appendix A to this subpart.

(d) If a carrier successfully completes the pre-authorization safety audit and the FMCSA approves its application submitted under this subpart, FMCSA will publish a summary of the application as a preliminary grant of authority in the FMCSA Register to give notice to the public in case anyone wishes to oppose the application, as required in § 365.109(b) of this part.

(e) If the FMCSA grants provisional operating authority to the applicant, it will assign a distinctive USDOT Number that identifies the motor carrier as authorized to operate beyond the municipalities in the United States on the U.S.-Mexico international border and beyond the commercial zones of such municipalities. In order to operate in the United States, a Mexico-domiciled motor carrier with provisional operating authority must:

(1) Have its surety or insurance provider file proof of financial responsibility in the form of certificates of

insurance, surety bonds, and endorsements, as required by § 387.301 of this subchapter;

(2) File a hard copy of, or have its process agent(s) electronically submit, Form BOC-3—Designation of Agents-Motor Carriers, Brokers and Freight Forwarders, as required by part 366 of this subchapter; and

(3) Comply with all provisions of the safety monitoring system in subpart B of part 385 of this subchapter, including successfully passing CVSA Level I inspections at least every 90 days and having decals affixed to each commercial motor vehicle operated in the United States as required by § 385.103(c) of this subchapter.

(f) The FMCSA may grant permanent operating authority to a Mexico-domiciled carrier no earlier than 18 months after the date that provisional operating authority is granted and only after successful completion to the satisfaction of the FMCSA of the safety monitoring system for Mexico-domiciled carriers set out in subpart B of part 385 of this subchapter. Successful completion includes obtaining a satisfactory safety rating as the result of a compliance review.

§ 365.509 Requirement to notify FMCSA of change in applicant information.

(a) A motor carrier subject to this subpart must notify the FMCSA of any changes or corrections to the information in parts I, IA or II submitted on the Form OP-1(MX) or the Form BOC-3—Designation of Agents —Motor Carriers, Brokers and Freight Forwarders during the application process or after having been granted provisional operating authority. The carrier

must notify the FMCSA in writing within 45 days of the change or correction.

(b) If a carrier fails to comply with paragraph (a) of this section, the FMCSA may suspend or revoke its operating authority until it meets those requirements.

§ 365.511 Requirement for CVSA inspection of vehicles during first three consecutive years of permanent operating authority.

A Mexico-domiciled motor carrier granted permanent operating authority must have its vehicles inspected by Commercial Vehicle Safety Alliance (CVSA)-certified inspectors every three months and display a current inspection decal attesting to the successful completion of such an inspection for at least three consecutive years after receiving permanent operating authority from the FMCSA.

Appendix A to Subpart E of Part 365—Explanation of Pre-Authorization Safety Audit Evaluation Criteria for Mexico-Domiciled Motor Carriers

I. General

(a) Section 350 of the Fiscal Year 2002 DOT Appropriations Act (Pub. L. 107-87) directed the FMCSA to perform a safety audit of each Mexico-domiciled motor carrier before the FMCSA grants the carrier provisional operating authority to operate beyond United States municipalities and commercial zones on the United States-Mexico international border.

(b) The FMCSA will decide whether it will conduct the safety audit at the Mexico-domiciled motor carrier's principal place of business in Mexico or at a location specified by the FMCSA in the United States, in

accordance with the statutory requirements that 50 percent of all safety audits must be conducted onsite and on-site inspections cover at least 50 percent of estimated truck traffic in any year. All records and documents must be made available for examination within 48 hours after a request is made. Saturdays, Sundays, and Federal holidays are excluded from the computation of the 48-hour period.

(c) The safety audit will include:

(1) Verification of available performance data and safety management programs;

(2) Verification of a controlled substances and alcohol testing program consistent with part 40 of this title;

(3) Verification of the carrier's system of compliance with hours-of-service rules in part 395 of this subchapter, including recordkeeping and retention;

(4) Verification of proof of financial responsibility;

(5) Review of available data concerning the carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with the Federal Motor Carrier Safety Regulations, parts 382 through 399 of this subchapter, and the Federal Hazardous Material Regulations, parts 171 through 180 of this title;

(6) Inspection of available commercial motor vehicles to be used under provisional operating authority, if any of these vehicles have not received a decal required by § 385.103(d) of this subchapter;

(7) Evaluation of the carrier's safety inspection, maintenance, and repair facilities or management

systems, including verification of records of periodic vehicle inspections;

(8) Verification of drivers' qualifications, including confirmation of the validity of the Licencia de Federal de Conductor of each driver the carrier intends to assign to operate under its provisional operating authority; and

(9) An interview of carrier officials to review safety management controls and evaluate any written safety oversight policies and practices.

(d) To successfully complete the safety audit, a Mexico-domiciled motor carrier must demonstrate to the FMCSA that it has the required elements in paragraphs (c)(2), (3), (4), (7), and (8) above and other basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. The FMCSA developed a "safety audit evaluation criteria," which uses data from the safety audit and roadside inspections to determine that each applicant for provisional operating authority has basic safety management controls in place.

(e) The safety audit evaluation process developed by the FMCSA is used to:

(1) Evaluate basic safety management controls and determine if each Mexico-domiciled carrier and each driver is able to operate safely in the United States beyond municipalities and commercial zones on the United States-Mexico international border; and

(2) Identify motor carriers and drivers who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before FMCSA grants the carriers provisional operating

authority to operate beyond United States municipalities and commercial zones on the United States-Mexico international border.

II. Source of the Data for the Safety Audit Evaluation Criteria

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. The FMCSA developed this tool to assist auditors and investigators in assessing the adequacy of a Mexico-domiciled carrier's basic safety management controls.

(b) The safety audit is a review of a Mexico-domiciled motor carrier's operation and is used to:

(1) Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144;

(2) Meet the requirements of Section 350 of the DOT Appropriations Act; and

(3) In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, the safety audit can be used to educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in driver qualification files, records of duty status, vehicle maintenance records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

III. Overall Determination of the Carrier's Basic Safety Management Controls

(a) The carrier will not be granted provisional operating authority if the FMCSA fails to:

(1) Verify a controlled substances and alcohol testing program consistent with part 40 of this title;

(2) Verify a system of compliance with hours-of-service rules of this subchapter, including record-keeping and retention;

(3) Verify proof of financial responsibility;

(4) Verify records of periodic vehicle inspections; and

(5) Verify drivers' qualifications of each driver the carrier intends to assign to operate under such authority, as required by parts 383 and 391 of this subchapter, including confirming the validity of each driver's Licencia de Federal de Conductor.

(b) If the FMCSA confirms each item under II (a)(1) through (5) above, the carrier will be granted provisional operating authority, except if FMCSA finds the carrier has inadequate basic safety management controls in at least three separate factors described in part III below. If FMCSA makes such a determination, the carrier's application for provisional operating authority will be denied.

IV. Evaluation of Regulatory Compliance

(a) During the safety audit, the FMCSA gathers information by reviewing a motor carrier's compliance with "acute" and "critical" regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B, VII. List of Acute and Critical Regulations to part 385 of this subchapter.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors, evaluated on the adequacy of the carrier's safety management controls, are:

(1) Factor 1—General: Parts 387 and 390;

(2) Factor 2—Driver: Parts 382, 383 and 391;

(3) Factor 3—Operational: Parts 392 and 395;

(4) Factor 4—Vehicle: Part 393, 396 and inspection data for the last 12 months;

(5) Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and

(6) Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

(i) Vehicle Factor. (1) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

(i) If the motor carrier has had at least three roadside inspections in the twelve months before the safety audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 to determine the carrier's level of safety management control for that factor.

(ii) If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396.

(2) Over two million inspections occur on the roadside each year in the United States. This vehicle inspection information is retained in the MCMIS and is integral to evaluating motor carriers' ability to successfully maintain their vehicles, thus preventing them from being placed OOS during roadside inspec-

tions. Each safety audit will continue to have the requirements of part 396, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

(j) Accident Factor. (1) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(2) Experience has shown that urban carriers, those motor carriers operating entirely within a radius of less than 100 air miles (normally urban areas), have a higher exposure to accident situations because of their environment and normally have higher accident rates.

(3) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident

rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the United States national average accident rate in Fiscal Years 1994, 1995, and 1996.

(4) The FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable."

(k) Factor Ratings

(1) The following table shows the five regulatory factors, parts of the FMCSRs and HMRs associated with each factor, and the accident factor. Each carrier's level of basic safety management controls with each factor is determined as follows:

(i) Factor 1—General: Parts 390 and 387;

(ii) Factor 2—Driver: Parts 382, 383, and 391;

(iii) Factor 3—Operational: Parts 392 and 395;

(iv) Factor 4—Vehicle: Parts 393, 396 and the Out of Service Rate;

(v) Factor 5—Hazardous Materials: Part 171, 177, 180 and 397; and

(vi) Factor 6—Accident: Recordable Accident Rate per Million Miles;

(2) For paragraphs III (k)(1)(i) through (v) (Factors 1 through 5), if the combined violations of acute and or critical regulations for each factor is equal to three or more points, the carrier is determined not to have basic safety management controls for that individual factor.

(3) For paragraphs III (k)(1)(vi), if the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

(l) Notwithstanding FMCSA verification of the items listed in part II (a)(1) through (5) above, if the safety audit determines the carrier has inadequate basic safety management controls in at least three separate factors described in part III, the carrier's application for provisional operating authority will be denied. For example, FMCSA evaluates a carrier finding:

(1) One instance of noncompliance with a critical regulation in part 387 scoring one point for Factor 1;

(2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;

(3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and

(4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

Under this example, the carrier will not receive provisional operating authority because it scored three or more points for Factors 2, 4, and 5 and FMCSA

determined the carrier had inadequate basic safety management controls in at least three separate factors.

Issued on: March 7, 2002.

Joseph M. Clapp,

Administrator.

Note: The following form will not appear in the Code of Federal Regulations.

* * * * *

[Form OP-1(MX) and Instructions for Completing Form OP-1(MX) are omitted.]

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

[Docket No. FMCSA-98-3299]

RIN 2126-AA35

Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States

Tuesday, March 19, 2002

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), (DOT).

ACTION: Interim final rule (IFR); request for comments.

SUMMARY: The FMCSA implements a safety monitoring system and compliance initiative designed to evaluate the continuing safety fitness of all Mexico-domiciled motor carriers within 18 months after receiving a provisional Certificate of Registration or provisional authority to operate in the United States. This rule includes requirements that were not proposed in the NPRM, but which are necessary to comply with the Fiscal Year 2002 DOT Appropriations Act enacted into law in December 2001. The rule also establishes suspension and revocation procedures for provisional Certificates of Registration and operating authority and incorporates criteria to be used by FMCSA in

evaluating whether Mexico-domiciled carriers exercise basic safety management controls. Therefore, the FMCSA is publishing this action as an interim final rule and is delaying the effective date in order to consider additional public comments regarding the safety monitoring system for Mexico-domiciled carriers. The revisions in this action are part of FMCSA's efforts to ensure the safe operation of Mexico-domiciled motor carriers in the United States.

DATES: This interim final rule is effective May 3, 2002. We must receive comments by April 18, 2002.

ADDRESSES: You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001 FAX (202) 493-2251, on-line at http://dmses.dot.gov/submit. You must include the docket number that appears in the heading of this document in your comment. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at http://dms.dot.gov/search.htm and typing the last four digits of the docket number appearing at the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Lamm, (202) 366-9699, FMCSA, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., p.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

FMCSA published the notice of proposed rulemaking (NPRM) for this action on May 3, 2001 (66 FR 22415) along with two related NPRMs proposing changes to the forms and procedures for Mexico-domiciled motor carriers to apply to operate in the United States. FMCSA is publishing one interim final rule and one final rule for those two NPRMs concurrently with this action. The preambles to those rules set out the background and history of the NAFTA issues and are not repeated here.

On December 18, 2001, the President signed into law the Fiscal Year 2002 DOT Appropriations Act, Public Law 107-87 (the Act). Section 350 of the Act prohibits the expenditure of appropriated funds for reviewing or processing applications by Mexico-domiciled carriers to operate beyond the commercial zones of municipalities in the United States located on the Mexican border (Mexico-domiciled long-haul carriers) until FMCSA and DOT take several specified actions. These actions include conducting pre-authorization safety examinations on Mexico-domiciled long-haul carriers, and complying

with certain inspection, staffing, rulemaking and reporting requirements. As pertinent to this rulemaking proceeding, Section 350(a)(2) of the Act requires that FMCSA conduct a full safety compliance review on Mexico-domiciled long-haul carriers within 18 months after the carrier is granted provisional operating authority. Section 350(a)(5) requires mandatory inspection of Mexico-domiciled long-haul commercial vehicles that do not display a valid Commercial Vehicle Safety Alliance (CVSA) decal, unless the carrier has been granted permanent operating authority for three consecutive years. Accordingly, we are revising the proposed rule to implement the compliance review requirement. We are also imposing a requirement that all long-haul Mexico-domiciled carriers entering the United States display a valid CVSA sticker on their vehicles while operating under provisional status.

Summary of Parties Submitting Comments

The agency received over 200 comments. Many comments were submitted to one or all three dockets for the May 3 NPRMs. The following discussion addresses substantive comments relevant to the safety monitoring and oversight system.

The commenters may be categorized as follows:

(1) Ten United States Senators: Senators Max Baucus, Evan Bayh, Jeff Bingaman, Thomas A. Daschle, Richard J. Durbin, Tom Harkin, Edward M. Kennedy, John F. Kerry, John Kyl, and Ron Wyden, submitted one unified set of comments to the President, who forwarded their comments to the docket.

(2) More than 180 private citizens. One hundred sixteen of these citizens submitted an "Urgent Action

Alert" form letter compiled and distributed by Citizens for Reliable and Safe Highways (CRASH) or alluded to recommendations in the form letter. The CRASH suggestions are discussed later in this document. Comments were also received from 20 Tucson/Green Valley, Arizona citizens.

(3) Four Mexican associations: the Asociacion Nacional De Transporte Privado (a national private motor carrier association), Camara Nacional Del Autotransporte De Carga A.C. (CANACAR) (a national trucking association), Asociacion De Agentes Aduanales De Nuevo Laredo (a customs broker association), and Central de Servicos de Carga de Nuevo Laredo (CenSeCar) (a local trucking association of Nuevo Laredo).

(4) Four labor organizations: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Amalgamated Transit Union (ATU), the International Brotherhood of Teamsters (Teamsters), and the AFL-CIO's Transportation Trades Department representing 33 unions (TTD). The TTD submitted separate comments from the AFL-CIO, its parent organization.

(5) Four motor carrier associations: the American Bus Association (ABA), American Trucking Associations, Inc., (ATA), the California Trucking Associations (CTA), and the Owner-Operator Independent Drivers Association (OOIDA).

(6) Three Texas transportation associations: the San Antonio Free Trade Alliance, Association of Laredo Freight Forwarding Agents, and Laredo Transportation Association.

(7) Four safety advocacy groups: CRASH, Public Citizen, the American Automobile Association (AAA), and Advocates for Highway and Auto Safety (AHAS).

(8) Four environmental groups that submitted one unified response: Friends of the Earth, the Sierra Club, the Natural Resources Defense Council and the Center for International Environmental Law.

(9) Three law enforcement agencies: the California Attorney General, the California Highway Patrol, and the Arizona Department of Public Safety.

(10) Two associations representing State enforcement and licensing agencies: the Commercial Vehicle Safety Alliance (CVSA) and the American Association of Motor Vehicle Administrators (AAMVA).

(11) Three motor carriers: United Parcel Service (UPS), Greyhound Lines and Transportes Quintanilla S.A. de C.V.

(12) The Transportation Lawyers of America, Air Courier Conference of America, Transportation Consumer Protection Council, the Laredo Chamber of Commerce, the National Association of Independent Insurers (NAII), and the American Insurance Association (AIA) each submitted one comment.

Discussion of Comments to the NPRM

The municipalities adjacent to Mexico in Texas, New Mexico, Arizona, and California and the commercial zones of such municipalities will be referred to as "border zones" for the purposes of this document.

United States Senators

Senators Baucus, Bayh, Bingaman, Daschle, Durbin, Harkin, Kennedy, Kerry, Kyl and Wyden believe that the Mexican government does not have a domestic truck safety system equivalent to that provided under U.S. law. They state that Mexico does not have hours-of-service laws and has only recently proposed the use of logbooks to record driving history. Therefore, they believe that cross-border truckers could easily enter U.S. highways fatigued. They note the DOT Inspector General has stated repeatedly that "fatigue is a major factor in commercial vehicle crashes."

The Senators believe that a "lack of sufficient inspection resources at the border and the proposed 18-month delay between the approval of general cross-border trucking applications and actual safety enforcement means that trucks may easily enter the United States over federal weight and size limits, a condition both inherently more dangerous to travelers and more stressful to our roadways."

The Senators urged the President to not grant operating certificates until the administration completes onsite compliance reviews and ensures the safety of the American traveler.

CRASH "Urgent Action Alert" Form Letter and Excerpts

One hundred sixteen individuals submitted comments repeating one or more of three standard phrases suggested by CRASH's "Urgent Action Alert". These phrases are as follows:

(1) Allowing Mexican carriers to operate for up to 18 months before a safety audit is done by U.S. officials is

totally unacceptable. Safety audits must be done before Mexican carriers are allowed to enter the U.S.

(2) Application forms and processes are important and necessary but as a member of CRASH and a concerned highway safety advocate, the U.S./Mexico border should remain closed to increased NAFTA cross-border trucking until meaningful safety standards and significantly increased compliance oversight are in place on both sides of the border.

(3) Not one human life should be sacrificed on the alter [sic] of NAFTA cross-border trucking.

Individuals

Al Feuer wrote that the border should be opened to truck traffic. He also believes safety inspections/audits should not be required before allowing Mexican trucks into the United States. Mr. Feuer reasoned that advance auditing would be unfair and statistically impractical because many Mexican drivers would be unable to read road signs and markings printed in English. He believes "it would be unfair to make Mexican truck drivers meet the same safety standards as American truck drivers—who can read English." Mr. Feuer believes advance auditing would not be cost effective, but it would be more cost effective to allow Mexico-domiciled motor carriers onto our highways for 18-months and then audit the results. Mr. Feuer writes "FMCSA could easily glean accident investigation data by tapping into computers at various local and State law enforcement agencies. Then it would simply be a matter of adding the number of Americans killed and injured by unsafe Mexican truck drivers. Those who caused more deaths and injuries than United States truck drivers could be banned from United States

highways; those who caused fewer deaths and injuries than United States truck drivers could continue driving in the United States. There's your audit."

Mark Pizenche, a Land Line magazine reader, believes the requirements are good, if they can be enforced. He suggests having a sign in clear sight identifying Mexican trucks, such as a flag on a plate.

Green Valley, Arizona Residents

Elmer Silaghi, a Green Valley resident, is concerned about the safety of highway conditions along Interstate 19 near Green Valley, a retirement community located between Nogales and Tucson, Arizona. He believes that implementation of the NAFTA access provisions will exacerbate the community's existing commercial vehicle traffic congestion. The docket also received 19 comments from Tucson and Green Valley residents referring to Mr. Silaghi's letter or stating identical concerns.

Mexican Associations

Camara Nacional Del Autotransporte De Carga A.C. (CANACAR) (a Mexican Trucking Association representing the Mexican trucking industry) opposes the proposal. It believes the proposed entrance requirements are too difficult. It states that "consciously or unconsciously, all three of FMCSA's proposals unfortunately are permeated with anti-Mexican sentiments * * * disguised in the form of concern for highway safety * * * based on false assumptions." CANACAR believes Mexican trucks are safer than those operated by the U.S. trucking industry. To support this position, CANACAR stated that the out-of-service rate for U.S. and Mexican drayage companies are not very different.

Asociacion De Agentes Aduanales De Nuevo Laredo and Central de Servicos de Carga de Nuevo Laredo (CenSeCar) had similar comments. Each believes imposing inspections on short-haul carriers at the border would impact the efficient flow of traffic as well as be an unfair practice compared with the northern border. The two borders are different, they assert, and a single cookie cutter approach should not be applied. They are also concerned that all government agencies on the border are grossly understaffed. They believe that imposing unfunded mandates and new procedures without regard to staffing is categorically wrong and shortsighted.

Labor Organizations

The AFL-CIO, ATU, TTD, and the Teamsters argued that opening the border is premature because of deficiencies in Mexico's internal safety standards for motor vehicles, and that a stronger implementation plan approved by the DOT Office of Inspector General is needed. The ATU fully supports and agrees with comments submitted by the AFL-CIO. It also concurs in Greyhound's comments, with one minor exception: ATU opposes the proposal to allow up to 18 months before a safety audit is conducted on a Mexico-domiciled carrier. The common viewpoints of ATU and Greyhound are outlined as follows:

(1) Mexican buses should not be authorized to operate in the United States absent reciprocal treatment of U.S. buses by Mexico.

(2) Mexican buses must be certified as safe before the first day they are authorized to operate in the United States.

(3) FMCSA must develop and implement an effective enforcement plan before opening the border.

(4) U.S. subsidiaries of Mexican companies must be subject to the same standards and reviews as their Mexican parent companies.

(5) Application and oversight rules must be applied to small passenger carrying vehicle operations (9 to 15 passengers), as well as cross-border bus operations.

(6) Application forms must require detailed explanations of compliance measures to ensure a full understanding of the applicable laws.

Motor Carrier Associations

American Bus Association (ABA)

The American Bus Association believes there is too little inspection of buses at the border and that FMCSA should do more border inspections. It believes FMCSA should enforce compliance with the Federal Motor Vehicle Safety Standards (FMVSS) maintained and enforced by the National Highway Traffic Safety Administration.

The ABA believes a final rule imposing the Federal Motor Carrier Safety Regulations (FMCSR) on 9- to 15-passenger vans is necessary, alleging that the poor safety record of these small passenger carrying vehicle operations must be a part of FMCSA's enforcement plan.

ABA argues that the proposed safety monitoring system is inadequate to protect passengers because the rule would only apply to operators providing cross border services. It believes FMCSA should provide the same scrutiny to Mexican-owned, U.S.-domiciled car-

riers as it does to Mexican-owned, Mexico-domiciled carriers. ABA contends that these Mexican-owned companies providing domestic service in the United States will probably have a greater impact in the United States than any other type of service. ABA believes that it is critical for these operations to be included in the safety evaluation process. Although such operations are subject to the FMCSRs, they are not subject to the safety monitoring system described in this action or the two NAFTA-related rulemakings published elsewhere in today's Federal Register. ABA believes that the NAFTA Arbitral Panel provided FMCSA with the discretion to apply a heightened level of scrutiny and enforcement measures toward Mexican companies operating within the United States—regardless of whether they are based in Mexico or in the United States. According to ABA, "the rules and oversight for Mexican-owned companies providing domestic U.S. service should be at least as stringent as the rules for Mexican companies providing international service." Accordingly, ABA believes that FMCSA must expedite a rulemaking that would put into place a procedure that ensures the safety of new entrants to the U.S. market, regardless of whether they are based in the United States or Mexico, and whether or not they are Mexico-or U.S.-owned.

ABA believes that conducting an onsite review of a motorcoach company before the issuance of operating authority would be beneficial, notwithstanding the lack of complete U.S. compliance data. ABA suggests there are several items that could be checked during an initial review, including the Mexican driver's compliance with licensing and medical certification procedures. Vehicles could also be checked to ensure that they comply with

the FMVSS. ABA believes that, given the lack of safety data and history for Mexican carriers, FMCSA should consider establishing procedures that include an expeditious and comprehensive onsite review of each applicant's safety program. ABA argues that an expedited safety review procedure conducted by Federal or State enforcement personnel would do far more to ensure safety than a simple review of submitted information and the monitoring of data generated by roadside inspections that may or may not occur. ABA suggests that the educational "Safety Review" procedure established during the late 1980s could be used as a template for trucking operations, as it afforded an opportunity for motor carrier personnel to interact directly with enforcement personnel to explain regulatory requirements, and answer questions. However, ABA does not believe that this procedure will adequately ensure the safety of passengers.

ABA contends that our rulemaking will do nothing to ensure that the cross-border provisions of NAFTA are implemented in a reciprocal manner. It argues the proposed rule outlined how Mexican operators and drivers will be treated while in the United States, but gave no assurance that the Mexican government would implement identical policies. For example, ABA argues the Mexican government has taken the position that it will grant cross-border service authority for U.S. carriers to serve only one point in Mexico, and that it will not allow U.S. carriers to own or operate bus terminals in Mexico. ABA also states that the Mexican government has indicated that it will not authorize U.S. carriers to provide incidental package service as part of their cross-border trips. ABA believes that finalizing the cross-border access proposal without assurances of

reciprocal treatment of U.S. companies by Mexico would result in unequal treatment in clear violation of both the letter and spirit of NAFTA.

American Trucking Associations, Inc. (ATA)

The ATA recommended that FMCSA provide specific guidelines for establishing safety monitoring systems, including defining a "poorly performing driver". The ATA recommends that FMCSA investigate the possibility that Mexico may consider the proposed safety review program an "extraterritorial application of United States law." In light of that possibility, the ATA recommends that FMCSA work jointly with the Secretaria de Comunicacianos y Transportes (SCT) to establish a joint safety review program for Mexico-domiciled motor carriers.

Owner Operator Independent Drivers Association (OOIDA)

OOIDA believes there is a lack of Mexican infrastructure, resources, and the will to promulgate and enforce compatible safety regulations in Mexico. It contends there is no true equivalent to the 49 CFR Part 383 commercial drivers licensing regulations in Mexico.

OOIDA cites the DOT OIG report that there is a link between Mexican truck condition and the level of inspection resources. OOIDA believes FMCSA must have a minimum of 80 new safety inspectors to do border crossing inspections and 40 safety investigators to conduct compliance reviews before granting authority. OOIDA believes the FMCSA goal of more inspectors is correct, but the plans do not include enough personnel.

OOIDA believes FMCSA's proposal to review Mexico-domiciled carriers within 18 months after granting them authority is unrealistic and dangerous. It recommends that FMCSA conduct onsite reviews in Mexico and verify whether a Mexico-domiciled motor carrier has been placed out-of-service in Mexico, has had hazardous material incidents in Mexico, has a drug and alcohol testing program, and maintains valid proof of financial responsibility.

California Trucking Association (CTA)

CTA supports the rules as "well-thought [out] applications and safety entry standards for Mexico-domiciled motor carriers," but sees a need for more resources to accomplish FMCSA goals. CTA believes the safety monitoring period should be shorter than 18 months and the program should include State and local law enforcement agencies in the review teams. It recommends involving FMCSA field offices in safety reviews because it believes the field offices know their local carriers. It also recommends promulgating review standards before the initial review period. CTA predicates its support of the three NAFTA rulemakings upon four conditions, including establishing "a level playing field for all motor carriers through the application of the same laws and regulations."

Safety Advocacy Groups

The safety advocacy groups believe FMCSA should conduct a safety audit before it allows a Mexico-domiciled motor carrier to operate in the United States and that FMCSA must have more U.S. inspection sites and more safety inspectors.

American Automobile Association (AAA)

The AAA's comments are generally representative of the safety groups. The AAA believes FMCSA must:

(1) Conduct safety audits before Mexico-domiciled trucks cross the border.

(2) Follow California's incentive to Mexico-domiciled motor carriers to display a valid CVSA decal on their trucks entering the United States. If one is not apparent, FMCSA should, like California, conduct the most rigorous CVSA, or equivalent, inspection at the border.

(3) Work closely with AAMVA to see that proper licensing procedures are in place and enforceable.

(4) Weigh trucks at the border.

(5) Demand proof of financial responsibility for every vehicle in every fleet at the border. Drivers should have to carry an insurance document unique to their particular vehicle.

(6) Ensure that every one of the 27 U.S.-Mexico border crossing points has resources to monitor compliance with the FMCSRs.

Public Citizen

Public Citizen contends the proposed rule fails to acknowledge the inadequacy of the existing enforcement structure and will not protect the public from unsafe trucks crossing into the United States. It believes unsafe trucks will inevitably escape detection and travel freely throughout the United States, endangering motorists and risking a trade-related debacle.

Public Citizen contends the penalties for Mexico-domiciled carriers under the safety monitoring program would be weaker than those currently applicable to U.S.-domiciled carriers. It argues that the serious infractions listed in proposed § 385.23 would only result in a carrier receiving a safety review—a review to which it would have to submit anyway—or a deficiency letter instructing the carrier to notify FMCSA that the problem has been corrected.

Public Citizen argues that the consequences of such violations for U.S. carriers are considerably more severe, including civil and criminal fines or even jail time. It believes allowing Mexican carriers to receive weak penalties for serious violations fails to communicate the seriousness of these violations to carriers and will not prepare them to comply with these regulations at the end of the safety oversight program.

Public Citizen also believes FMCSA omitted some serious violations from the list of violations that would trigger an expedited safety review or deficiency letter. Under the proposal, an accident resulting in a hazardous materials incident prompts the expedited safety review or deficiency letter process, but an accident resulting in death, or a violation of the hours-of-service limit, does not. Public Citizen believes potential hours-of-service violations are of particular concern because Mexican carriers require their workers to drive for much longer periods than the U.S. hours-of-service limit, and Mexican laws do not include hours-of-service rules. It believes we should add hours-of-service infractions to the list in proposed § 385.23 and publish a plan for enforcing hours-of-service limits for drivers crossing the border who are not subject to any time controls while in Mexico.

Public Citizen notes the NPRM does not specify a time limit for carriers to respond to deficiency letters before their provisional registration is suspended. Public Citizen believes it is also unclear how soon an expedited safety review would take place after a serious violation is discovered and how long a carrier can be suspended without taking corrective action before its registration is revoked. It contends that without time limits, an unsafe carrier could operate indefinitely before any limitations are placed on it. It believes we must revise the NPRM to provide definite time restrictions to ensure that non-compliant carriers do not slip through the cracks.

Public Citizen also believes that FMCSA suspension or revocation of provisional registration will not change a carrier's ability to send trucks across the border. It cites a November 1999 DOT Inspector General report finding that carriers were able to retain their certificates of registration in their vehicles and continue operating across the border even after these certificates were revoked. It believes no information would be available to inspectors to verify that a certificate of registration is valid, or to verify that a driver has a certificate of registration if he or she is not able to present it upon request.

Environmental Groups

Friends of the Earth, the Natural Resources Defense Council, the Sierra Club and The Center for International Law commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children.

The Attorney General for the State of California submitted a comment in which he asserted that the FMCSA would be required to perform a "conformity determination" pursuant to the Clean Air Act (CAA), before finalizing these rulemakings. Under the CAA, Federal agencies are prohibited from supporting in any way, any activity that does not conform to an approved State Implementation Plan (SIP), (42 U.S.C. 7006). EPA regulations implementing this provision require Federal agencies to determine whether an action would conform with the SIP (a "conformity determination"), before taking the action (40 CFR 93.150). The Attorney General asserts that the FMCSA must make a conformity determination before taking final action to implement regulations that would allow Mexican trucks to operate beyond the border. The Attorney General provided technical information to support his assertion that allowing Mexican trucks to operate beyond the border would likely not be in conformity with California's SIP.

Commercial Vehicle Safety Alliance (CVSA)

CVSA believes the rules will not sufficiently reassure the public. It makes eight recommendations for strengthening the monitoring program as key to its support of this rulemaking. CVSA's recommendations include:

(1) Perform "case studies" on Mexico-domiciled motor carriers. Case studies would facilitate a collaborative safety culture and provide objective, uniform and quantitative data upon which to base policy decisions. They would be similar to the proposed safety review, except case studies would: (a) Be completed before granting operating authority; (b) be conducted

at the motor carrier's place of business; (c) include both regulatory evaluation and educational components; (d) include a representative sample of CVSA Level V inspections; and (e) adopt a collaborative approach that includes U.S., Canadian and Mexican officials. CVSA believes these case studies should initially be conducted on all carriers applying for authority to operate beyond the border zones, then on a sampling of carriers who wish to operate solely within the border zones.

(2) Require all motor carriers and drivers to renew their valid Licencia Federal de Conductor and be entered into the Mexican commercial drivers' licensing database before being granted operating authority in the United States.

(3) Work with CVSA and the States to develop the necessary legislative and policy changes for providing States the ability to enforce operating authority requirements.

(4) Investigate the equipment manufacturing standards in Mexico and report how they differ from those required in the United States, specifically with respect to compliance with the FMVSS. CVSA thinks this is particularly important to the roadside inspection program and weight enforcement.

(5) Provide clear policy direction on how to address the language issue in the field. CVSA wants us to apply a reasonable standard to determine whether a driver "can read and speak the English language sufficiently to converse with the general public, understand highway traffic signs and signals in the English language, to respond to official inquiries and to make entries on reports and records."

(6) Coordinate outreach and training programs that are delivered to Mexican motor carriers, drivers, and enforcement personnel. CVSA believes a clear and consistent message is important to the education and learning process.

(7) Make sure appropriate modifications are made to software and information systems in a timely manner and adequate time and resources are provided for training enforcement officials for all changes that are promulgated in the final rule.

(8) Explore multiple technology options (hardware, software, and communications), conduct the necessary due diligence and pilot test potential solutions for facilitating throughput at the borders and performing safety assessments on motor carriers. CVSA wants us to consider various types of incentives for safe operators and to encourage technology adoption.

American Association of Motor Vehicle Administrators (AAMVA)

AAMVA believes that Mexico-domiciled motor vehicles should be inspected for conformance to Federal motor carrier safety regulations before they are allowed to operate in the United States. Specifically, it supports periodic motor vehicle safety inspections similar to the CVSA inspections.

It also suggests conducting complete safety audits of carriers in Mexico before approving applications for operating authority. It believes a safety audit and inspection of vehicles before approval of operating authority will ensure that any vehicle entering the United States from Mexico comports with applicable safety standards and does not pose undue risk to citizens on the nation's roadways.

Transportation Consumer Protection Council

The Transportation Consumer Protection Council, representing 500 shippers and receivers of freight, believes FMCSA should require truck inspections before carriers are allowed into the United States.

National Association of Independent Insurers (NAII)

The NAII believes DOT was unable to do much to prepare for the beginning of true cross-border trucking during the previous administration. It believes that preparations must be our top priority and that we need more people and resources to handle the workload than were requested for fiscal year 2002. It believes the most pressing need to keep American roads safe when the border opens is for us to have a detailed plan showing who will do what and where.

American Insurance Association (AIA)

The AIA alleges that the proposed rules fail to provide for safety and are inconsistent with law, citing 49 U.S.C. 113(a) as providing for safety as the "highest priority." It believes follow-up inspections should be done earlier than 18 months. The AIA also believes conducting compliance reviews under § 385.13(a) that apply the criteria for evaluating safety management controls described in § 385.7 would not be sufficient. It recommends requiring safety reviews to occur on the Mexico- domiciled motor carrier's premises.

The AIA states that different procedures are expressly permissible under NAFTA and believes FMCSA could have proposed more stringent motor carrier safety procedures on Mexican carriers.

FMCSA Response to Comments

The DOT Appropriations Act

The most common recommendation made in the comments was that Mexico-domiciled carriers undergo a safety review by FMCSA before being allowed to operate in the United States. This concern was addressed in § 350(a)(1) of the DOT Appropriations Act. The FMCSA's companion rule amending our part 365 application procedures will require that Mexico-domiciled long-haul carriers receive a safety audit before receiving provisional operating authority. This pre-authorization safety audit will include verification of performance data, safety management programs (including hours-of-service compliance, vehicle inspection and maintenance and drug and alcohol testing programs) and financial responsibility. The audit will also entail vehicle inspections, verification of driver qualifications and an interview with carrier officials to review safety management controls and evaluate written safety oversight policies and practices.

FMCSA intends to provide all Mexico-domiciled carriers educational and technical assistance when they apply for provisional operating authority or a provisional Certificate of Registration. The education and technical assistance package will consist of material designed to assist the Mexico-domiciled applicant in complying with the FMCSRs and Hazardous Materials Regulations (HMRs) and establishing good safety management practices. It will include information on driver qualifications; controlled substances and alcohol use testing; commercial drivers licenses; minimum levels of financial responsibility; accident reports; requirements applicable to the driving of motor vehicles;

vehicle inspection, repair and maintenance; hours of service and records of duty status of drivers; and requirements applicable to the transportation of hazardous materials. These materials will help long-haul carriers prepare for the pre-authorization safety audit.

We are not extending the pre-authorization audit requirement to carriers seeking to operate solely within the border zones under Certificates of Registration. Border zone operations have been permitted for nearly 20 years without a pre-authorization audit requirement. The most serious safety concerns, as evidenced by the provisions of § 350 of the Act and reflected in the comments to the NPRM, involve Mexico-domiciled carriers who will be operating vehicles beyond the border zones in long-haul service. We believe that the informational and certification requirements added to the revised OP-2 form in our companion rule and the post-operational audit required by this rule will be sufficient to protect public safety in the border zones.

Section 350(a)(2) of the Act requires FMCSA to conduct a full compliance review of Mexico-domiciled long-haul carriers within 18 months after issuance of provisional operating authority. This review will be consistent with our existing safety fitness evaluation procedures set forth in subpart A of part 385 and will result in the assignment of a safety rating. As required by section 350(a)(2), the compliance review must result in a "Satisfactory" safety rating before the carrier is granted permanent operating authority to operate beyond the border zones. We have incorporated these requirements into this interim final rule. In accordance with section 350(a)(2), at least 50 percent of these compliance reviews will be conducted onsite, including

any compliance review conducted on a Mexico-domiciled carrier with four or more commercial vehicles that did not undergo an on-site safety audit before receiving provisional authority.

This rule also addresses the section 350(a)(5) requirement that any Mexico-domiciled vehicle operated in the United States beyond the border zones receive a Level 1 inspection if it does not display a valid CVSA inspection decal, unless the carrier has held permanent authority for at least three consecutive years. In order to reduce the burden on State and Federal inspection officials, at least during the 18-month provisional operating period covered by this rule, we will require all commercial vehicles operated by Mexico-domiciled long-haul carriers to display a valid CVSA inspection decal when entering the United States.

Vehicle Size and Weight Issues

In response to the Senators' concern about oversize and overweight vehicles, section 350(a)(7)(A) of the DOT Appropriations Act requires FMCSA to:

(1) Equip all United States-Mexico commercial border crossings with scales suitable for enforcement action;

(2) Equip five of the ten highest volume commercial vehicle traffic crossings with weigh-in- motion systems before reviewing or processing applications by Mexico-domiciled carriers to operate beyond the border zones;

(3) Equip the remaining five of the ten highest volume crossings with weigh- in-motion systems within 12 months; and

(4) Require inspectors to verify the weight of each Mexico-domiciled carrier's commercial vehicle entering

the United States at each weigh-in-motion equipped high volume border crossing.

The FMCSA will comply with these requirements and work with the Federal Highway Administration and States to assure the effective use of the weigh-in-motion equipment as part of an effective enforcement program. Enforcement of size and weight requirements is a State function, under the oversight of the Federal Highway Administration.

Driver Hours-of-Service

In response to the Senators' comments regarding Mexican hours-of-service laws (also discussed by Public Citizen), we note that the use of the record of duty status, commonly known as a logbook, is the tool the FMCSA uses for enforcing compliance with U.S. hours-of-service requirements. Upon entering the United States, each driver must either: (a) Have in his/her possession a record of duty status current on the day of the examination showing the total hours worked for the prior seven consecutive days, including time spent outside the United States; or, (b) demonstrate that he/she is operating as a "100 air-mile (161 air-kilometer) radius driver" under § 395.1(e).

In addition, section 350(a)(9) of the DOT Appropriations Act requires Mexico-domiciled carriers to only enter the United States at commercial border crossings: (1) Where and when a certified motor carrier safety inspector is on duty; and (2) where adequate capacity exists to conduct a sufficient number of meaningful vehicle safety inspections and to accommodate vehicles placed out-of-service as a result of these meaningful safety inspections. The examination of drivers resulting from the section 350(a)(9) vehicle inspection

requirements would allow inspection of each Mexico-domiciled carrier's drivers upon entry and would allow certified motor carrier safety inspectors to review the driver's logbooks and discover whether hours-of-service violations have occurred.

Similarity of Regulatory Treatment

In response to the comments of the Mexican trade associations, FMCSA believes the regulatory requirements imposed in this rule are within the standards set out in the NAFTA Arbitral Panel Report, a copy of which is in the docket. The Panel noted that:

(1) The United States is not required to treat applications from Mexico-domiciled trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis; and

(2) Given the different enforcement mechanisms in place in the United States and Mexico, it may not be unreasonable for the United States to address legitimate safety concerns. Similarly, the Panel found it might be reasonable for the United States to implement different procedures with respect to service providers from another NAFTA country if necessary to ensure compliance with its own local standards by these service providers. Although CANACAR believes Mexican trucks are safer based on out-of-service rates for U.S. and Mexican drayage companies, the fact remains that Mexico's motor carrier safety regulatory system lacks several of the components that are central to the U.S. system. As the Panel found, the United States is responsible for the safe operation of motor carriers within U.S. territory, regardless of the carriers' country of origin, and FMCSA believes we must

ensure each carrier is safe to protect U.S. highway users. This rule, in conjunction with the other rules pertaining to Mexican motor carriers published elsewhere in today's Federal Register, will provide FMCSA with the necessary level of assurance, in a manner consistent with the Panel's findings, that Mexican motor carriers seeking U.S. operating authority are capable of complying with the U.S. safety regulatory regime.

ABA, AHAS, and other commenters cite language from the NAFTA Arbitral Panel's Final Report to support their comments favoring more stringent safety measures with regard to Mexico-domiciled carriers. The Panel stated, among other things, that to the extent that Mexican licensing and inspection requirements may differ from U.S. requirements, the United States might be justified in using methods to ensure Mexico-domiciled carrier compliance with the U.S. regulatory regime that differ from those used for U.S. and Canadian carriers, provided that those methods are used in good faith to address legitimate safety concerns and fully conform with all relevant NAFTA provisions. FMCSA believes that the more stringent measures in the rules published today fulfill its statutory obligation to ensure the safe operation of motor carriers in the United States in a manner that is consistent with the Panel's construction of NAFTA.

Reciprocal Treatment

ABA urged us not to publish final rules permitting Mexico-domiciled carriers to operate beyond the border zones until the government of Mexico guarantees that U.S. carriers operating in Mexico will receive the same regulatory treatment afforded to Mexican carriers

operating in that country. These regulations are intended to establish procedures to ensure that Mexico-domiciled carriers operate safely while traveling in the United States, not to police compliance with the terms of NAFTA. The NAFTA contains specific procedures designed to resolve disputes over whether the parties are fulfilling their obligations under the agreement.

Mexican-Owned, U.S.-Domiciled Motor Carriers

In response to comments by ABA, ATU, and Greyhound urging us to subject Mexican-owned, U.S.-domiciled passenger carriers to the same procedures applicable to Mexican-owned, Mexico-domiciled passenger carriers, we note that President Bush, in June 2001, issued a Memorandum that, among other things, allows a Mexican citizen to establish a U.S.-based passenger carrier to provide point-to-point transportation within the United States under the same procedures applicable to U.S.-owned, U.S.-domiciled passenger carriers. Mexican nationals may establish a passenger carrier operation in the United States by either purchasing an existing motor carrier or establishing a new motor carrier. Such carriers, as Greyhound itself points out, must use U.S. citizens or resident aliens to provide passenger service in the United States. The drivers they employ must possess a Commercial Drivers License issued in the United States. In addition, these carriers are subject to the same safety requirements, inspection procedures, enforcement mechanisms, and fines and out-of-service orders that apply to any other U.S. carrier. Thus, there is no basis to treat these carriers any differently from U.S.-owned, U.S.-domiciled carriers based solely on the owner's nationality. All U.S.-domiciled carriers, regardless of the owner's nationality, will be subject to an

interim final rule establishing application procedures and safety monitoring requirements for new entrant carriers, which we expect to publish in the near future.

Small Passenger Carrying Vehicle Operations

With respect to the small passenger carrying vehicle issues raised by the ABA, the FMCSA published a Notice of Proposed Rulemaking on January 11, 2001 (66 FR 2767) that proposed to apply most of the FMCSRs (except for CDL and drug and alcohol testing requirements) to certain passenger carriers operating vehicles designed or used to transport between 9 and 15 passengers. The FMCSA's final small passenger carrying vehicle rule, which will be published in the near future, will address the safety issues regarding this type of operation.

Environmental Issues

Friends of the Earth, the Natural Resources Defense Council, the Sierra Club and The Center for International Law commented that FMCSA is required to perform additional analysis to meet the requirements of the National Environmental Policy Act (NEPA) and Executive Order 13045, concerning the protection of children from environmental health and safety risks. FMCSA is preparing an agency order to meet the requirements of DOT Order 5610.1C (that establishes the Department of Transportation's policy for compliance with NEPA by the Department's administrations). FMCSA has conducted a programmatic environmental assessment (PEA) of the three NAFTA-related rulemakings in accordance with the DOT Order and the regulations of the Council on Environmental Quality. A discussion of the PEA and its findings is presented later in the preamble under "Regulatory Analyses and

Notices." A copy of the PEA is in the docket to this rulemaking. Executive Order 13045 is addressed in the Regulatory Analyses and Notices section of this preamble.

We have reviewed our obligations under the CAA, and believe that we are in compliance with the general conformity requirements as implemented by the U.S. Environmental Protection Agency (EPA). EPA's implementing regulations exempt certain actions from the general conformity determination requirements. Actions which would result in no increase in emissions or clearly a de minimis increase, such as rulemaking (40 CFR 93.153(c)(iii)), are exempt from requiring a conformity determination. In addition, actions which do not exceed certain threshold emissions rates set forth in 40 CFR 93.153(b) are also exempt from the conformity determination requirements. The FMCSA rulemakings meet both of these exemption standards. First, as noted elsewhere in this preamble to this rule, the actions being taken by the FMCSA are rulemaking actions to improve FMCSA's regulatory oversight, not an action to modify the moratorium and allow Mexican trucks to operate beyond the border. Second, the air quality impacts from each of the FMCSA's rules neither individually nor collectively exceed the threshold emissions rates established by EPA (see Appendix C of the Environmental Assessment accompanying these rulemakings for a more detailed discussion of air quality impacts). As a result, we believe that FMCSA's rulemaking actions comply with the CAA requirements, and that no conformity determination is required.

Penalties

We believe Public Citizen did not understand the full range of penalties available to FMCSA when it made its comments that the penalties for Mexico-domiciled carriers under the safety monitoring program would be weaker than those that currently apply to U.S.-domiciled carriers. In addition to the procedures established by this rule, Mexico-domiciled carriers are fully subject to the full range of enforcement actions and sanctions faced by U.S. and Canadian carriers, including civil and criminal fines and jail time.

Expedited Action Criteria

Although violations of the hours-of-service limits are not specifically included in the list of violations prompting an expedited safety or compliance review or demand for corrective action, hours-of-service violations will be taken into account as part of a carrier's out-of-service rate, which is a triggering factor for expedited action under § 385.105(a)(7).

Although a fatal accident is not included on the list of violations that would trigger an expedited safety audit or compliance review or a demand for corrective action, Mexico-domiciled motor carriers will be subject to existing FMCSA policy regarding crashes. Under this policy, FMCSA conducts a basic Crash Inquiry on any motor carrier having a crash involving two or more fatalities, two or more injuries, or a combination of fatalities and injuries. This review policy also includes any crash that may result in the agency acquiring detailed knowledge that would be beneficial for any unusual post- crash public interest. The Crash Inquiry would include crashes involving motor coaches, unqualified drivers, explosions, and substantial fire.

FMCSA policy automatically expands the basic Crash Inquiry into a full compliance review as soon as practicable when the motor carrier is not in good standing with FMCSA. A motor carrier is not in good standing with FMCSA when it is does not have a safety rating (which would generally be the case for new entrant Mexico-domiciled carriers prior to the performance of a compliance review), the safety rating is less than satisfactory, or the carrier is on FMCSA's Safety Status Measurement System (SafeStat) with a SafeStat category of A, B, C, or D. For more information about SafeStat, see the FMCSA web page at: http://www.fmcsa.dot.gov/factsfigs/safetstat.htm.

The Mexico-domiciled motor carrier's application will create a new record attached to its new USDOT identification number without any safety rating attached to it. The lack of a safety rating for a Mexico-domiciled motor carrier coupled with a multiple fatality or injury crash will result in the Mexico-domiciled motor carrier being subject to a full compliance review as soon as practicable. This procedure is identical to the current treatment of new entrant U.S.- or Canada-domiciled motor carriers lacking a safety rating.

Procedural Time Limits

In response to Public Citizen's concern that the rule did not propose specific time limits for carriers to address identified problems and respond to letters demanding corrective action, we have added a provision that failure to respond within 30 days will result in the suspension of the carrier's provisional registration. Public Citizen also raised a question concerning the status of an uninsured carrier operating while the agency performs a safety review or processes a demand

for corrective action. FMCSA has authority, under 49 CFR 387.31(g), to deny entry to any Mexico-domiciled carrier not carrying the required evidence of financial responsibility in its vehicles. The agency also has authority, under 49 U.S.C. 14702, to obtain a court order enjoining a carrier from operating without insurance independent of the safety monitoring process. Finally, Mexico-domiciled carriers operating beyond the border zones will be required to file evidence of insurance with FMCSA as a condition for retaining their provisional operating authority. As is the case for U.S. and Canada-domiciled carriers, failure to have a current insurance filing will result in revocation of authority under existing FMCSA procedures.

Public Citizen's concerns about the timeliness of an expedited safety review are valid. The agency will strive to conduct the review as soon as possible and will give priority in assigning resources to conduct these reviews. We believe § 385.111 of the final rule adequately addresses Public Citizen's concerns about the length of time a carrier can be suspended without taking corrective action before its registration is revoked. An agency suspension of any carrier's authority to operate means the carrier cannot operate legally until it corrects its deficiencies and has received written notice from FMCSA allowing it to resume operating. The suspension order will provide for revocation of the provisional registration if necessary corrective action is not taken within 30 days.

The violations requiring expedited action are warning signs that a carrier may not have the necessary basic safety management controls in place, thus generating an immediate response in the form of a corrective action demand letter, safety audit or compliance

review. FMCSA will take these violations seriously, but they do not necessarily establish that the carrier is unfit to operate. If the carrier demonstrates that it has taken steps to correct the identified problems and that it is otherwise exercising the necessary basic safety management controls, it does not present a danger to public safety and should be allowed to continue to operate.

FMCSA is developing a database that will indicate whether a carrier has had its authority suspended or revoked. Unregistered carriers and carriers whose registration has been suspended or revoked will be denied entry into the United States. Use of this data will also help to ensure that enforcement personnel can place out-of-service at the roadside those carriers that continue to operate commercial motor vehicles within the United States after registration has been suspended or revoked.

Compliance With Federal Motor Vehicle Safety Standards (FMVSS)

FMCSA and its State partners will continue to enforce the FMVSS through roadside inspections, including inspections at the border. Roadside inspections provide a means of ensuring that vehicles meet the applicable FMVSS in effect on the date the vehicle was manufactured.

Part 393 of the FMCSRs currently includes cross-references to most of the FMVSS applicable to heavy trucks and buses. The rules require that motor carriers operating in the United States, including Mexico-domiciled carriers, must maintain the specified safety equipment and features that the National Highway Traffic Safety Administration (NHTSA) requires ve-

hicle manufacturers to install. Failure to maintain these safety devices or features is a violation of the FMCSRs. If the violations are discovered during a roadside inspection, and they are serious enough to meet the current out-of-service criteria used in roadside inspections (i.e., the condition of the vehicle is likely to cause an accident or a mechanical breakdown), the vehicle would be placed out of service until the necessary repairs are made. Any FMVSS violations that involve noncompliance with the standards presently incorporated into part 393 could subject motor carriers to a maximum civil penalty of $10,000 per violation. If FMCSA determines that Mexico-domiciled carriers are operating vehicles that do not comply with the applicable FMVSS, we could also take appropriate enforcement action for making a false certification on Form OP-1(MX) or OP-2.

To further strengthen FMVSS enforcement, FMCSA and NHTSA are initiating several regulatory actions in today's Federal Register to ensure that all commercial vehicles operated in the United States, including those operated by Mexican and Canadian carriers, display a NHTSA-required label certifying compliance with the FMVSS. FMCSA is publishing a Notice of Proposed Rulemaking proposing to incorporate the labeling requirement into part 393 and NHTSA is publishing two NPRMs and one policy statement relating to the certification label.

Many commercial motor vehicles owned by Mexican and Canadian carriers may comply with the FMVSSs in effect at the time of their manufacture. However, because these vehicles were not originally manufactured for use in the United States, they are not likely to have FMVSS certification labels. The NHTSA

policy statement permits a vehicle manufacturer to retroactively apply a label to a commercial motor vehicle certifying, if it has sufficient basis for doing so, that the vehicle complied with all applicable FMVSS in effect at the time it was originally manufactured. In connection with this policy statement, NHTSA is proposing recordkeeping requirements for foreign manufacturers that choose to retroactively certify vehicles.

In the third NHTSA document published in today's Federal Register, NHTSA is proposing to codify, in 49 CFR part 591, its longstanding interpretation of the term "import" as including bringing commercial vehicles into the United States for the purpose of transporting cargo or passengers.

Staffing Issues

Several parties expressed concern about whether there are adequate resources available to conduct the necessary inspections and safety reviews. Section 350(a)(9) of the Act prohibits Mexico-domiciled motor carriers from entering the United States at any border crossing where a certified motor carrier inspector is not on duty or where there is not adequate capacity to conduct either a sufficient number of meaningful vehicle safety inspections or accommodate vehicles placed out-of-service as a result of safety inspections. Congress has appropriated $57.8 million for FMCSA to handle its responsibilities in connection with implementing the NAFTA access provisions for Mexico-domiciled carriers. FMCSA intends to hire over 200 people for this purpose, most of whom will be conducting vehicle inspections, pre-authorization safety audits and 18-month safety audits. We believe this

significant augmentation of our existing staff at the southern border will enable us to fully comply with our safety monitoring responsibilities.

Responses to Other Comments

The individuals who submitted form comments provided by CRASH did not elaborate on what they considered to be "meaningful safety standards and significantly increased compliance oversight." We have addressed those concerns in this and the companion rulemakings published elsewhere in today's Federal Register.

We recognize the concerns of the Green Valley, Arizona residents along Interstate 19, but any increase in traffic along this route will not result from the implementation of this rule and its two companion rules. These rules do not open the border to Mexico-domiciled trucks, they impose safety certification and monitoring requirements on Mexico-domiciled motor carriers operating in the United States under the provisions of NAFTA.

In response to Mr. Pizenche's comments, 49 CFR 390.21 currently requires that all motor vehicles, including foreign vehicles, must have the carrier's name and USDOT number on each side of the power unit, and must be readable from 50 feet. In addition, our companion rule establishing application requirements for Mexico-domiciled long-haul carriers published elsewhere in today's Federal Register, requires that FMCSA issue a new USDOT identification number to each Mexico-domiciled motor carrier applicant intending to operate beyond the United States-Mexico border zones. This new USDOT identification number will have a suffix that will denote the type of authority held

by the Mexico-domiciled motor carrier and allow FMCSA to monitor the carrier's performance by inspecting crash and roadside inspection reports.

Section-by-Section Summary

We have changed the section numbers as they appeared in the NPRM. The sections are now numbered 385.101 through 385.119.

Section 385.101

This section contains the definitions of terms used in new subpart B. These include:

(1) Provisional certificate of registration, the registration issued to Mexico-domiciled border zone carriers;

(2) Provisional operating authority, the registration issued to Mexico-domiciled long-haul carriers; and

(3) Safety audit, the review conducted by FMCSA on a border zone carrier during the 18-month provisional period to determine whether the carrier exercises basic safety management controls. Because we will be conducting compliance reviews on Mexico-domiciled long-haul carriers during the 18-month provisional period, we have also added a reference to the existing definition of compliance review in § 385.3.

Section 385.103

This section describes the elements of the safety monitoring system, which include roadside monitoring, safety audits for border zone carriers and compliance reviews for long-haul carriers. FMCSA has added a requirement that all Mexico-domiciled motor vehicles operating beyond the border zones display a valid CVSA inspection decal throughout the 18-month pro-

visional operating authority period. A CVSA inspection is only valid for three months from the date of inspection. Consequently, Mexico-domiciled long-haul carriers will need to get a CVSA inspection for their vehicles every three months. FMCSA will work with CVSA to ensure that this requirement is operational when the President lifts the moratorium on granting operating authority to Mexico-domiciled motor carriers.

Section 385.105

Section 385.105(a) lists the serious violations or infractions that will result in an expedited safety audit or compliance review or, in the alternative, a demand that the carrier demonstrate in writing that it has taken immediate corrective action. The infractions listed are essentially identical to those proposed in the NPRM. We have added clarifying language regarding what constitutes a valid Licencia Federal. The type of action taken by FMCSA in response to the violations will depend upon the specific circumstances of the violations.

Sections 385.105(b) provides that failure to respond to a request for a written response demonstrating corrective action within 30 days will result in suspension of provisional registration until the required showing of corrective action is made.

Section 385.105(c) clarifies that a carrier that successfully responds to a demand for corrective action still must undergo a safety audit or compliance review during the provisional period if it has not already done so.

Section 385.107

This section describes the safety audit and what follow-up action will be taken by the agency. Safety

audits on Mexico-domiciled carriers operating only in the border zones under provisional Certificates of Registration will be conducted by an FMCSA safety specialist, usually onsite, although FMCSA reserves the right to conduct the audit at an alternate site. The safety audit will assess the adequacy of the carrier's basic safety management controls in accordance with the criteria established in new Appendix A. Appendix A does not specifically reference Mexico-domiciled motor carriers because we are considering adopting it eventually for all new entrants, except for Mexico-domiciled long-haul carriers, who must undergo compliance reviews.

The audit will consist of a review of the Mexico-domiciled carrier's safety data, a review of requested motor carrier documents, and an interview session with the Mexico-domiciled carrier by the FMCSA safety specialist. The objective of the safety audit is both to educate the carrier on compliance with the FMCSRs and HMRs and to determine areas where the carrier might be deficient in terms of compliance. Areas covered include: financial responsibility; commercial driver's license standards; qualification of drivers; controlled substances and alcohol use and testing; transporting and marking hazardous materials; requirements applicable to driving a motor vehicle; hours of service; and vehicle inspection, repair, and maintenance. A safety audit is different than a compliance review in that it focuses on providing safety management and technical assistance and is not intended to result in a safety fitness determination. However, if the audit demonstrates that the carrier fails to establish and/or exercise basic safety management controls, FMCSA will ensure that the necessary

corrective action is taken or else the carrier will not be allowed to continue operating in the United States.

FMCSA Division Administrators or State Directors will make the initial determination about the adequacy of a Mexico-domiciled carrier's basic safety management controls and whether necessary corrective action has been taken.

If the safety audit demonstrates that the carrier is exercising the necessary basic safety management controls, the carrier will retain its provisional status and will continue to be closely monitored until the expiration of the 18-month safety monitoring period. At that time, the provisional designation will be removed from its registration, provided its safety record remains in good standing.

FMCSA anticipates that the basic safety management practices of the large majority of Mexico-domiciled carriers will prove to be adequate based on the combined effect of:

(1) Providing educational material to the carrier in the application process;

(2) Requiring the carrier to certify how it will comply with the FMCSRs;

(3) Requiring long-haul carriers to successfully complete a pre-authority safety audit; and

(4) Providing notice to the carrier of what items will be covered in the safety audit or compliance review conducted during the provisional registration period.

If the safety audit reveals that the Mexico-domiciled carrier's basic safety management practices are inadequate, FMCSA will initiate a suspension and revocation proceeding. The carrier will be required to remedy the

deficiencies or else its provisional Certificate of Registration will be revoked.

Section 385.109

Section 350(a)(2) of the Act requires the compliance review of Mexico- domiciled long-haul operations to be conducted consistent with our existing safety fitness evaluation procedures in part 385 and that the carrier receive a Satisfactory safety rating before receiving permanent operating authority. Therefore, an FMCSA safety specialist will conduct compliance reviews of Mexico-domiciled long-haul carriers applying the evaluation criteria in Appendix B to part 385, the same criteria now in use for U.S and Canadian carriers. These criteria provide for the assignment of one of three proposed safety ratings upon completion of a compliance review: Satisfactory, Conditional, or Unsatisfactory.

A carrier receiving a Satisfactory rating will continue to operate under provisional status until the expiration of the 18-month safety monitoring period. At that time, the provisional designation will be removed from its registration, provided its safety record remains in good standing.

The consequences of an Unsatisfactory rating are similar to those attached to a safety audit in which it is determined that a carrier does not have adequate safety management controls. The carrier's provisional operating authority will be suspended and the FMCSA will notify the carrier that it is required to take action to improve its practices. Failure to make the necessary changes to remedy inadequate basic safety management controls will result in revocation of a carrier's provisional operating authority.

A Conditional rating is indicative of deficiencies in a carrier's safety management controls which raise concerns about its ability to operate safely but are not of sufficient magnitude to declare the carrier unfit. Because the Act requires Mexico-domiciled long-haul carriers to achieve a Satisfactory rating in order to retain their provisional operating authority, a revocation proceeding will be initiated following the assignment of a Conditional rating. However, because our existing safety rating procedures do not equate a conditional rating with unfitness and permit conditional-rated carriers to continue operating, provisional operating authority will not be suspended at the time a revocation proceeding is initiated.

Section 385.111

In response to comments, we have added procedures incorporating specific time frames for suspension and revocation of provisional operating authority and Certificates of Registration. These procedures are designed to balance the need to protect the public from potentially unsafe carriers while preserving the carrier's due process rights.

Mexico-domiciled carriers will have 10 days following notification of an Unsatisfactory rating or an unsuccessful safety audit to demonstrate that the FMCSA committed material error. If they fail to do so, the FMCSA will suspend the carrier's provisional operating authority or provisional Certificate of Registration on the 15th day, thus placing it out of service. If the carrier fails to demonstrate that it has taken necessary corrective action within 30 days from the date of suspension, FMCSA will revoke the carrier's provisional

operating authority or provisional Certificate of Registration.

Carriers assigned a Conditional rating will not have their provisional operating authority suspended, but will still need to demonstrate that necessary corrective action has been taken to prevent their authority from being revoked.

Section 385.111(e) provides for suspension of provisional registration when the carrier does not provide documents necessary for the completion of a safety audit or compliance review or does not submit sufficient evidence of corrective action in response to a written demand under § 385.105. The suspension will remain in effect until the necessary documents are produced and the carrier:

(1) Successfully completes the safety audit;

(2) Receives a Satisfactory or Conditional safety rating; or

(3) Demonstrates that it has taken the necessary corrective action in response to a § 385.105 demand. Although the assignment of a Conditional rating will be sufficient to lift the suspension, the carrier will still need to upgrade its rating to Satisfactory in order to keep its provisional operating authority.

Section 385.111(f) is intended to address the problem of recidivism, i.e., carriers who, after taking corrective action resulting in the lifting of a suspension during the provisional operating or registration period, commit one of the serious safety infractions listed in § 385.105(a). In these circumstances, the suspension will be automatically reinstated and the carrier's provisional operating authority or Certificate of Registra-

tion will be revoked unless it demonstrates it did not commit the infraction.

In a similar vein, § 385.111(g) provides for the initiation of a revocation proceeding upon receipt of credible evidence that a carrier operated in violation of a suspension order, even if that suspension order was eventually lifted. A Mexico-domiciled motor carrier that operates a commercial motor vehicle in violation of a suspension or out-of-service order will also be subject to the penalties provided in 49 U.S.C. 521(b)(2)(A), not to exceed $10,000 for each offense.

Section 385.113

Under this section, a Mexico-domiciled carrier may request FMCSA to conduct an administrative review if it believes the agency has committed an error in assigning a safety rating or determining that its basic safety management controls are inadequate. The carrier's request must explain the error it believes FMCSA committed and include a list of all factual and procedural issues in dispute. In addition, the carrier must include any information or documents that support its argument. Following the administrative review, which will be conducted by the FMCSA's Associate Administrator for Enforcement, the agency will notify the carrier of its decision, which will constitute the final action of the agency. Administrative review under this section will be completed in no more than 10 days after the request is received.

Section 385.115

This section prohibits a Mexico-domiciled carrier whose registration has been revoked from reapplying for provisional operating authority or a Certificate of

Registration for at least 30 days after the date of revocation. A Mexico- domiciled carrier reapplying for provisional registration will have to demonstrate to FMCSA's satisfaction that it has corrected the deficiencies that resulted in revocation of its registration and that it otherwise has effectively functioning basic safety management systems in place. Long-haul carriers will again be required to undergo a pre-authorization safety audit. FMCSA is obtaining information regarding revocations by inserting appropriate questions on the application forms developed in the companion rules amending parts 365 and 368 published elsewhere in today's Federal Register.

Section 385.117

This section provides that at the end of the 18-month period, the Mexico-domiciled carrier will receive permanent DOT operating authority or a Certificate of Registration if it has successfully met the requirements of the most recent safety audit or has received a Satisfactory rating, and is not currently under a notice from FMCSA to remedy its basic safety management practices. Thereafter, it will be treated like any other non-new-entrant motor carrier. If the Mexico-domiciled carrier is under a notice to remedy its basic safety management practices, its provisional designation will continue until FMCSA determines the carrier is complying with the Federal safety regulations or revokes its registration under § 385.111.

If a compliance review or safety audit has not been conducted on a Mexico-domiciled carrier within the 18-month oversight period, the provisional designation will continue until such time as FMCSA completes and evaluates a review or audit.

Compliance reviews and safety audits will normally begin within 90 to 120 days after the grant of provisional operating authority or a provisional Certificate of Registration, so that sufficient records will be available to review. FMCSA will work to ensure that all Mexico-domiciled carriers will be scheduled for an audit or compliance review within the 18-month period.

Section 385.119

This section clarifies that although FMCSA's NAFTA implementation rules will include a pre-authorization safety audit for long-haul Mexico-domiciled carriers and at least one post-operational compliance review or safety audit, this is not the exclusive safety oversight that FMCSA will apply to Mexico-domiciled carriers. FMCSA will also apply the full range of oversight and enforcement actions currently applicable to all non-new-entrant motor carriers, including civil penalties and the suspension and revocation of registration or operating authority due to persistent violations of DOT regulations governing motor carrier operations in interstate commerce.

Appendix A to Part 385

Appendix A is being added to inform Mexico-domiciled motor carriers what the evaluation criteria will be that FMCSA will use during a safety audit to rate a carrier's compliance with the FMCSRs and applicable HMRs, assess its operational safety, and assess its basic management safety management controls. The safety audit evaluation criteria are similar to the current safety rating methodology. The safety audit evaluation criteria looks at the same list of critical and acute violations as in the safety rating methodology and both use the same six factors: (1) General: Parts 387 and

390; (2) Driver: Parts 382, 383, and 391; (3) Operational: Parts 392 and 395; (4) Vehicle: Parts 393, 396, and inspection data for the last 12 months; (5) Hazardous Materials: Parts 171, 177, 180 and 397; and (6) Recordable Accident Rate per Million Miles. All Mexico-domiciled motor carriers who have a provisional Certificate of Registration will receive a safety audit. These carrier's safety audits will be subject to the safety audit evaluation criteria in Appendix A to part 385. All Mexico-domiciled motor carriers who receive a compliance review will be subject to the safety rating methodology detailed in Appendix B to part 385.

The safety audit evaluation criteria are based on 49 CFR 385.5 (Safety fitness standard) and § 385.7 (Factors to be considered in determining a safety rating). The FMCSA will use the evaluation process to ensure that Mexico-domiciled motor carriers have basic safety management controls in place. The evaluation process will also enable the FMCSA to focus its limited resources on examining the operations of carriers needing improvement in their compliance with the FMCSRs and the applicable HMRs.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979) because of public interest. It has been reviewed by the Office of Management and Budget. However, it

is anticipated that the economic impact of the revisions in this rulemaking will be minimal.

Nevertheless, the subject of safe operations by Mexico-domiciled carriers in the United States will likely generate considerable public interest within the meaning of Executive Order 12866. The manner in which FMCSA carries out its safety oversight responsibilities with respect to this cross-border motor carrier transportation may be of substantial interest to the domestic motor carrier industry, the Congress, and the public at large.

The Regulatory Evaluation analyzes the costs and benefits of this rule and the two companion NAFTA-related rules published elsewhere in today's Federal Register. Because these rules are so closely interrelated, we did not attempt to prepare separate analyses for each rule.

The evaluation estimated costs and benefits based on three different scenarios, with a high, low and medium number of Mexico-domiciled carriers assumed covered by the rules. The costs of these rules are minimal under all three scenarios. Over 10 years, the costs range from $53 million for the low scenario to approximately $76 million for the high scenario. Forty percent of these costs are borne by the FMCSA, while the remaining costs are paid by Mexico-domiciled carriers. The largest costs are those associated with conducting pre-authorization safety audits, safety audits within 18 months of a carrier's receiving provisional Certificate of Registration, compliance reviews within 18 months of a carrier's receiving provisional operating authority, and the loss of a carrier's ability to operate in the United States.

The FMCSA used the cost effectiveness approach to determine the benefits of these rules. This approach involves estimating the number of crashes that would have to be deterred in order for the proposals to be cost effective. Over ten years, the low scenario would have to deter 640 forecast crashes to be cost beneficial, the medium scenario would have to deter 838, and the high scenario would have to deter 929. While the overall number of crashes to be avoided under the medium and high scenario is fairly high, the number falls rapidly over the 10-year analysis period and beyond. The tenth year deterrence rate is one-quarter to one-sixth the size of the first year's rate.

A copy of the Regulatory Evaluation is in the docket for this rulemaking.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (Pub. L. 96-354, 5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement and Fairness Act (Pub. L. 104-121), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The United States did not have in place a special system to ensure the safety of Mexico-domiciled carriers operating in the United States. Mexico-domiciled carriers will be subject to all the same safety regulations as domestic carriers. However, FMCSA's enforcement of the FMCSRs has become increasingly data dependent in the last several years. Several programs have been put in place to continually analyze crash rates, out-of-service (OOS) rates, compliance re-

view records, and other data sources to allow the agency to focus on high-risk carriers. This strategy is only effective if FMCSA has adequate data on carriers' size, operations, and history. Thus, a key component of FMCSA's three companion NAFTA-related rules is the requirement that Mexico- domiciled carriers operating in the United States complete a Form MCS-150-Motor Carrier Identification Report, and update the information submitted in the appropriate application form (OP-1(MX) or OP-2) when key information changes. This will allow FMCSA to better monitor these carriers and to quickly determine whether their safety or OOS record changes.

The more stringent oversight procedures will also allow FMCSA to respond more quickly when safety problems emerge. The safety audits, compliance reviews and CVSA inspections will provide FMCSA with more detailed information about Mexico-domiciled carriers, and allow FMCSA to act appropriately upon discovering safety problems.

The objective of these rules is to enhance the safety of Mexico-domiciled carriers operating in the United States. The rules describe what additional information Mexico-domiciled carriers will have to submit, and outline the procedure for dealing with possible safety problems.

The safety monitoring system, combined with the safety certifications and other information to be submitted in the OP-1(MX) and OP-2 applications and the pre-authorization safety audit of Mexico-domiciled carriers seeking to operate beyond the border zones, are a means of ensuring that:

(1) Mexico-domiciled applicants are sufficiently knowledgeable about safety requirements before commencing operations (a prerequisite to being able to comply);

(2) Mexico-domiciled applicants conduct operations in the United States in accordance with their application certifications and the conditions of their registrations; and

(3) The safety performance of Mexico-domiciled applicants is at least equal to that of United States and Canadian carriers operating in the United States.

These rules will primarily affect Mexico-domiciled small motor carriers who wish to operate in the United States. The amount of information these carriers will have to supply to FMCSA has been increased, and we estimate that they will spend two additional hours gathering data for the OP-1(MX) and OP-2 application forms. Mexico-domiciled carriers will also have to undergo safety audits, an increased number of CVSA roadside inspections and compliance reviews, if they operate beyond the border zones. We presented three growth scenarios in the regulatory evaluation: a high option, with 11,787 Mexico-domiciled carriers in the baseline; a medium scenario, with 9,500 Mexico-domiciled carriers in the baseline; and a low scenario, with 4,500 Mexico-domiciled carriers in the baseline. Under all three options, the FMCSA believes that the number of applicants will match approximately that observed in the last few years before this publication date, approximately 1,365 applicants per year.

A review of the Motor Carrier Management Information System (MCMIS) census file reveals that the vast majority of Mexico-domiciled carriers are small, with 75

percent having three or fewer vehicles. Carriers at the 95th percentile carrier had only 15 trucks or buses.

These rules should not have any impact on small United States based motor carriers.

FMCSA did not establish any different requirements or timetables for small entities. As noted above, we do not believe these requirements are onerous. Most covered carriers will be required to spend two extra hours to complete the relevant forms, undergo at least one safety audit at four hours each, have their trucks inspected more frequently and, if they obtain long-haul authority, undergo a compliance review taking six hours. This part 385 interim final rule would not achieve its purposes if small entities were exempt. In order to ensure the safety of Mexico-domiciled carriers, the rule must have a consistent procedure for addressing safety problems. Exempting small motor carriers (which, as was noted above, are the vast majority or Mexico-domiciled carriers who would operate in the United States) would defeat the purpose of these rules.

FMCSA did not consolidate or simplify the compliance and reporting requirements for small carriers. Small United States carriers already have to comply with the paperwork requirements in part 365. There is no evidence that domestic carriers find these provisions confusing or particularly burdensome. Apropos the part 385 provisions, FMCSA believes the requirements are fairly straightforward, and it would not be possible to simplify them. A simplification of any substance would make the rule ineffectual. Given the compelling interest in assuring the safety of Mexico-domiciled carriers operating in the United States, and the fact

that the majority of these carriers are small entities, no special changes were made.

The part 385 requirements include performance standards. A Mexico-domiciled carrier will need to complete a safety improvement plan if its performance demonstrates that it is not operating safely, either through a high OOS rate or other problems.

Therefore, FMCSA certifies that this rule will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of $100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. FMCSA has determined that the changes proposed in this rulemaking would not have an impact of $100 million or more in any one year.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in Sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that also concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children. The agency has determined that this rule is not a "covered regulatory action" as defined under Executive Order 13045.

This rule is not economically significant under Executive Order 12866 because the FMCSA has determined that the changes in this rulemaking would not have an impact of $100 million or more in any one year. The costs range from $53 to $76 million over 10 years. This rule also does not concern an environmental health risk or safety risk that would disproportionately affect children. Mexico-domiciled motor carriers who intend to operate commercial motor vehicles anywhere in the United States must comply with current U.S. Environmental Protection Agency regulations and other United States environmental laws under this rule and others being published elsewhere in today's Federal Register. Nonetheless, the agency has conducted a programmatic environmental assessment as discussed later in this preamble.

Executive Order 12630 (Taking of Private Property)

This final rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999 (64 FR 43255, August 10, 1999). FMCSA has determined that this action would not have significant Federalism implications or limit the policymaking discretion of the States.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) [44 U.S.C. 3501-3520], Federal agencies must determine whether requirements contained in rulemakings are subject to information collection provisions of the PRA and, if they are, obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor or require through regulations. FMCSA has determined that this regulation does not constitute an information collection with the scope or meaning of the PRA.

FMCSA performs safety compliance assessments and enforcement activities as required by statutes and the FMCSRs. Implementation of this proposal would create no additional paperwork burden on Mexico-domiciled carriers that comply with the FMCSRs. Any safety data that FMCSA solicits from individual motor carriers regarding deficiency and/or non-compliance is not considered a collection of information because this type of response is required of such carriers as part of the usual and customary compliance and enforcement practice under the FMCSRs. Accordingly, FMCSA has determined that this action would not affect any requirements under the PRA.

National Environmental Policy Act

FMCSA is a new administration within the Department of Transportation (DOT). FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). FMCSA expects the draft Order to appear in the Federal Register for public comment in the near future. The framework of the FMCSA Order will be consistent with and reflect the procedures for considering environmental impacts under DOT Order 5610.1C. FMCSA has analyzed this rule under the NEPA and DOT Order 5610.1C, and has issued a Finding Of No Significant Impact (FONSI). The FONSI and the environmental assessment are in the docket to this rule.

FMCSA invites comments on the programmatic environmental assessment.

Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 49 CFR Part 385

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FMCSA amends 49 CFR part 385 as set forth below:

PART 385—SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 is revised to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5113, 13901-13905, 31136, 31144, 31148, and 31502; Section 350 of Public Law 107- 87; and 49 CFR 1.73.

2. Sections 385.1 through 385.19 are designated as Subpart A-General, and a new Subpart B is added consisting of new §§ 385.101 through 385.119 to read as follows:

Subpart B—Safety Monitoring System for Mexico-Domiciled Carriers

Sec.

Subpart B—Safety Monitoring System for Mexico-Domiciled Carriers

§ 385.101 Definitions

Compliance Review means a compliance review as defined in § 385.3 of this part.

Provisional certificate of registration means the registration under § 368.6 of this subchapter that the FMCSA grants to a Mexico-domiciled motor carrier to provide interstate transportation of property within the United States solely within the municipalities along the United States-Mexico border and the commercial zones of such municipalities. It is provisional because it will

be revoked if the registrant does not demonstrate that it is exercising basic safety management controls during the safety monitoring period established in this subpart.

Provisional operating authority means the registration under § 365.507 of this subchapter that the FMCSA grants to a Mexico-domiciled motor carrier to provide interstate transportation within the United States beyond the municipalities along the United States-Mexico border and the commercial zones of such municipalities. It is provisional because it will be revoked if the registrant is not assigned a Satisfactory safety rating following a compliance review conducted during the safety monitoring period established in this subpart.

Safety audit means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRs and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

§ 385.103 Safety monitoring system.

(a) General. Each Mexico-domiciled carrier operating in the United States will be subject to an oversight program to monitor its compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs), Federal Motor Vehicle Safety Standards (FMVSSs), and Hazardous Materials Regulations (HMRs).

(b) Roadside monitoring. Each Mexico-domiciled carrier that receives provisional operating authority or a provisional Certificate of Registration will be subject

to intensified monitoring through frequent roadside inspections.

(c) CVSA decal. Each Mexico-domiciled carrier granted provisional operating authority under part 365 of this subchapter must have on every commercial motor vehicle it operates in the United States a current decal attesting to a satisfactory inspection by a Commercial Vehicle Safety Alliance (CVSA) inspector.

(d) Safety audit. The FMCSA will conduct a safety audit on a Mexico-domiciled carrier within 18 months after the FMCSA issues the carrier a provisional Certificate of Registration under part 368 of this subchapter.

(e) Compliance review. The FMCSA will conduct a compliance review on a Mexico-domiciled carrier within 18 months after the FMCSA issues the carrier provisional operating authority under part 365 of this subchapter.

§ 385.105 Expedited action.

(a) A Mexico-domiciled motor carrier committing any of the following violations identified through roadside inspections, or by any other means, may be subjected to an expedited safety audit or compliance review, or may be required to submit a written response demonstrating corrective action:

(1) Using drivers not possessing, or operating without, a valid Licencia Federal de Conductor. An invalid Licencia Federal de Conductor includes one that is falsified, revoked, expired, or missing a required endorsement.

(2) Operating vehicles that have been placed out of service for violations of the Commercial Vehicle Safety

Alliance (CVSA) North American Standard Out-of-Service Criteria, without making the required repairs.

(3) Involvement in, due to carrier act or omission, a hazardous materials incident within the United States involving:

(i) A highway route controlled quantity of a Class 7 (radioactive) material as defined in § 173.403 of this title;

(ii) Any quantity of a Class 1, Division 1.1, 1.2, or 1.3 explosive as defined in § 173.50 of this title; or

(iii) Any quantity of a poison inhalation hazard Zone A or B material as defined in § § 173.115, 173.132, or 173.133 of this title.

(4) Involvement in, due to carrier act or omission, two or more hazardous material incidents occurring within the United States and involving any hazardous material not listed in paragraph (a) (3) of this section and defined in chapter I of this title.

(5) Using a driver who tests positive for controlled substances or alcohol or who refuses to submit to required controlled substances or alcohol tests.

(6) Operating within the United States a motor vehicle that is not insured as required by part 387 of this chapter.

(7) Having a driver or vehicle out-of-service rate of 50 percent or more based upon at least three inspections occurring within a consecutive 90-day period.

(b) Failure to respond to an agency demand for a written response demonstrating corrective action within 30 days will result in the suspension of the carrier's provisional operating authority or provisional Certifi-

cate of Registration until the required showing of corrective action is submitted to the FMCSA.

(c) A satisfactory response to a written demand for corrective action does not excuse a carrier from the requirement that it undergo a safety audit or compliance review, as appropriate, during the provisional registration period.

§ 385.107 The safety audit.

(a) The criteria used in a safety audit to determine whether a Mexico-domiciled carrier exercises the necessary basic safety management controls are specified in Appendix A to this part.

(b) If the FMCSA determines, based on the safety audit, that the Mexico-domiciled carrier has adequate basic safety management controls, the FMCSA will provide the carrier written notice of this finding as soon as practicable, but not later than 45 days after the completion of the safety audit. The carrier's Certificate of Registration will remain provisional and the carrier's on-highway performance will continue to be closely monitored for the remainder of the 18-month provisional registration period.

(c) If the FMCSA determines, based on the safety audit, that the Mexico- domiciled carrier's basic safety management controls are inadequate, it will initiate a suspension and revocation proceeding in accordance with § 385.111 of this subpart.

(d) The safety audit is also used to assess the basic safety management controls of Mexico-domiciled applicants for provisional operating authority to operate beyond United States municipalities and commercial

zones on the United States-Mexico border under § 365.507 of this subchapter.

§ 385.109 The compliance review.

(a) The criteria used in a compliance review to determine whether a Mexico-domiciled carrier granted provisional operating authority under § 365.507 of this subchapter exercises the necessary basic safety management controls are specified in Appendix B to this part.

(b) Satisfactory Rating. If the FMCSA assigns a Mexico-domiciled carrier a Satisfactory rating following a compliance review conducted under this subpart, the FMCSA will provide the carrier written notice as soon as practicable, but not later than 45 days after the completion of the compliance review. The carrier's operating authority will remain in provisional status and its on-highway performance will continue to be closely monitored for the remainder of the 18-month provisional registration period.

(c) Conditional Rating. If the FMCSA assigns a Mexico-domiciled carrier a Conditional rating following a compliance review conducted under this subpart, it will initiate a revocation proceeding in accordance with § 385.111 of this subpart. The carrier's provisional operating authority will not be suspended prior to the conclusion of the revocation proceeding.

(d) Unsatisfactory Rating. If the FMCSA assigns a Mexico-domiciled carrier an Unsatisfactory rating following a compliance review conducted under this subpart, it will initiate a suspension and revocation proceeding in accordance with § 385.111 of this subpart.

§ 385.111 Suspension and revocation of Mexico-domiciled carrier registration.

(a) If a carrier is assigned an "Unsatisfactory" safety rating following a compliance review conducted under this subpart, or a safety audit conducted under this subpart determines that a carrier does not exercise the basic safety management controls necessary to ensure safe operations, the FMCSA will provide the carrier written notice, as soon as practicable, that its registration will be suspended effective 15 days from the service date of the notice unless the carrier demonstrates, within 10 days of the service date of the notice, that the compliance review or safety audit contains material error.

(b) For purposes of this section, material error is a mistake or series of mistakes that resulted in an erroneous safety rating or an erroneous determination that the carrier does not exercise the necessary basic safety management controls.

(c) If the carrier demonstrates that the compliance review or safety audit contained material error, its registration will not be suspended. If the carrier fails to show a material error in the safety audit, the FMCSA will issue an Order:

(1) Suspending the carrier's provisional operating authority or provisional Certificate of Registration and requiring it to immediately cease all further operations in the United States; and

(2) Notifying the carrier that its provisional operating authority or provisional Certificate of Registration will be revoked unless it presents evidence of necessary corrective action within 30 days from the service date of the Order.

(d) If a carrier is assigned a "Conditional" rating following a compliance review conducted under this subpart, the provisions of subparagraphs (a) through (c) of this section will apply, except that its provisional registration will not be suspended under paragraph (c)(1) of this section.

(e) If a carrier subject to this subpart fails to provide the necessary documents for a safety audit or compliance review upon reasonable request, or fails to submit evidence of the necessary corrective action as required by § 385.105 of this subpart, the FMCSA will provide the carrier with written notice, as soon as practicable, that its registration will be suspended 15 days from the service date of the notice unless it provides all necessary documents or information. This suspension will remain in effect until the necessary documents or information are produced and:

(1) A safety audit determines that the carrier exercises basic safety management controls necessary for safe operations;

(2) The carrier is rated Satisfactory or Conditional after a compliance review; or

(3) The FMCSA determines, following review of the carrier's response to a demand for corrective action under § 385.105, that the carrier has taken the necessary corrective action.

(f) If a carrier commits any of the violations specified in § 385.105(a) of this subpart after the removal of a suspension issued under this section, the suspension will be automatically reinstated. The FMCSA will issue an Order requiring the carrier to cease further operations in the United States and demonstrate, within 15 days from the service date of the Order, that it did not

commit the alleged violation(s). If the carrier fails to demonstrate that it did not commit the violation(s), the FMCSA will issue an Order revoking its provisional operating authority or provisional Certificate of Registration.

(g) If the FMCSA receives credible evidence that a carrier has operated in violation of a suspension order issued under this section, it will issue an Order requiring the carrier to show cause, within 10 days of the service date of the Order, why its provisional operating authority or provisional Certificate of Registration should not be revoked. If the carrier fails to make the necessary showing, the FMCSA will revoke its registration.

(h) If a Mexico-domiciled motor carrier operates a commercial motor vehicle in violation of a suspension or out-of-service order, it is subject to the penalty provisions in 49 U.S.C. 521(b)(2)(A), not to exceed $10,000 for each offense.

(i) Notwithstanding any provision of this subpart, a carrier subject to this subpart is also subject to the suspension and revocation provisions of 49 U.S.C. 13905 for repeated violations of DOT regulations governing its motor carrier operations.

§ 385.113 Administrative review.

(a) A Mexico-domiciled motor carrier may request the FMCSA to conduct an administrative review if it believes the FMCSA has committed an error in assigning a safety rating or suspending or revoking the carrier's provisional operating authority or provisional Certificate of Registration under this subpart.

(b) The carrier must submit its request in writing, in English, to the Associate Administrator for Enforcement, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington DC 20590.

(c) The carrier's request must explain the error it believes the FMCSA committed in assigning the safety rating or suspending or revoking the carrier's provisional operating authority or provisional Certificate of Registration and include any information or documents that support its argument.

(d) The FMCSA will complete its administrative review no later than 10 days after the carrier submits its request for review. The Associate Administrator's decision will constitute the final agency action.

§ 385.115 Reapplying for provisional registration.

(a) A Mexico-domiciled motor carrier whose provisional operating authority or provisional Certificate of Registration has been revoked may reapply under part 365 or 368 of this subchapter, as appropriate, no sooner than 30 days after the date of revocation.

(b) The Mexico-domiciled motor carrier will be required to initiate the application process from the beginning. The carrier will be required to demonstrate how it has corrected the deficiencies that resulted in revocation of its registration and how it will ensure that it will have adequate basic safety management controls. It will also have to undergo a pre-authorization safety audit if it applies for provisional operating authority under part 365 of this subchapter.

§ 385.117 Duration of safety monitoring system.

(a) Each Mexico-domiciled carrier subject to this subpart will remain in the safety monitoring system for at least 18 months from the date FMCSA issues its provisional Certificate of Registration or provisional operating authority, except as provided in paragraphs (c) and (d) of this section.

(b) If, at the end of this 18-month period, the carrier's most recent safety audit or safety rating was Satisfactory and no additional enforcement or safety improvement actions are pending under this subpart, the Mexico-domiciled carrier's provisional operating authority or provisional Certificate of Registration will become permanent.

(c) If, at the end of this 18-month period, the FMCSA has not been able to conduct a safety audit or compliance review, the carrier will remain in the safety monitoring system until a safety audit or compliance review is conducted. If the results of the safety audit or compliance review are satisfactory, the carrier's provisional operating authority or provisional Certificate of Registration will become permanent.

(d) If, at the end of this 18-month period, the carrier's provisional operating authority or provisional Certificate of Registration is suspended under § 385.111(a) of this subpart, the carrier will remain in the safety monitoring system until the FMCSA either:

(1) Determines that the carrier has taken corrective action; or

(2) Completes measures to revoke the carrier's provisional operating authority or provisional Certificate of Registration under § 385.111(c) of this subpart.

§ 385.119 Applicability of safety fitness and enforcement procedures.

At all times during which a Mexico-domiciled motor carrier is subject to the safety monitoring system in this subpart, it is also subject to the general safety fitness procedures established in subpart A of this part and to compliance and enforcement procedures applicable to all carriers regulated by the FMCSA.

3. Part 385 is amended by adding a new Appendix A to read as follows:

Appendix A to Part 385—Explanation of Safety Audit Evaluation Criteria

I. General

(a) Section 210 of the Motor Carrier Safety Improvement Act (49 U.S.C. 31144) directed the Secretary to establish a procedure whereby each owner and each operator granted new authority must undergo a safety review within 18 months after the owner or operator begins operations. The Secretary was also required to establish the elements of this safety review, including basic safety management controls. The Secretary, in turn, delegated this to the FMCSA.

(b) To meet the safety standard, a motor carrier must demonstrate to the FMCSA that it has basic safety management controls in place which function adequately to ensure minimum acceptable compliance with the applicable safety requirements. A "safety audit evaluation criteria" was developed by the FMCSA, which uses data from the safety audit and roadside inspections to determine that each owner and each operator applicant for a provisional operating authority or provisional Certificate of Registration has

basic safety management controls in place. The term "safety audit" is the equivalent to the "safety review" required by Sec. 210. Using "safety audit" avoids any possible confusion with the safety reviews previously conducted by the agency that were discontinued on September 30, 1994.

(c) The safety audit evaluation process developed by the FMCSA is used to:

1. Evaluate basic safety management controls and determine if each owner and each operator is able to operate safely in interstate commerce; and

2. Identify owners and operators who are having safety problems and need improvement in their compliance with the FMCSRs and the HMRs, before they are granted permanent registration.

II. Source of the Data for the Safety Audit Evaluation Criteria

(a) The FMCSA's evaluation criteria are built upon the operational tool known as the safety audit. This tool was developed to assist auditors and investigators in assessing the adequacy of a new entrant's basic safety management controls.

(b) The safety audit is a review of a Mexico-domiciled motor carrier's operation and is used to:

1. Determine if a carrier has the basic safety management controls required by 49 U.S.C. 31144;

2. Meet the requirements of Section 350 of the DOT Appropriations Act; and

3. In the event that a carrier is found not to be in compliance with applicable FMCSRs and HMRs, the

safety audit can be used to educate the carrier on how to comply with U.S. safety rules.

(c) Documents such as those contained in the driver qualification files, records of duty status, vehicle maintenance records, and other records are reviewed for compliance with the FMCSRs and HMRs. Violations are cited on the safety audit. Performance-based information, when available, is utilized to evaluate the carrier's compliance with the vehicle regulations. Recordable accident information is also collected.

III. Determining if the Carrier Has Basic Safety Management Controls

(a) During the safety audit, the FMCSA gathers information by reviewing a motor carrier's compliance with "acute" and "critical" regulations of the FMCSRs and HMRs.

(b) Acute regulations are those where noncompliance is so severe as to require immediate corrective actions by a motor carrier regardless of the overall basic safety management controls of the motor carrier.

(c) Critical regulations are those where noncompliance relates to management and/or operational controls. These are indicative of breakdowns in a carrier's management controls.

(d) The list of the acute and critical regulations, which are used in determining if a carrier has basic safety management controls in place, is included in Appendix B, VII. List of Acute and Critical Regulations.

(e) Noncompliance with acute and critical regulations are indicators of inadequate safety management controls and usually higher than average accident rates.

(f) Parts of the FMCSRs and the HMRs having similar characteristics are combined together into six regulatory areas called "factors." The regulatory factors, evaluated on the basis of the adequacy of the carrier's safety management controls, are:

1. Factor 1—General: Parts 387 and 390;

2. Factor 2—Driver: Parts 382, 383 and 391;

3. Factor 3—Operational: Parts 392 and 395;

4. Factor 4—Vehicle: Part 393, 396 and inspection data for the last 12 months;

5. Factor 5—Hazardous Materials: Parts 171, 177, 180 and 397; and

6. Factor 6—Accident: Recordable Accident Rate per Million Miles.

(g) For each instance of noncompliance with an acute regulation, 1.5 points will be assessed.

(h) For each instance of noncompliance with a critical regulation, 1 point will be assessed.

A. Vehicle Factor

(a) When at least three vehicle inspections are recorded in the Motor Carrier Management Information System (MCMIS) during the twelve months before the safety audit or performed at the time of the review, the Vehicle Factor (Part 396) will be evaluated on the basis of the Out-of-Service (OOS) rates and noncompliance with acute and critical regulations. The results of the review of the OOS rate will affect the Vehicle Factor as follows:

1. If the motor carrier has had at least three roadside inspections in the twelve months before the safety

audit, and the vehicle OOS rate is 34 percent or higher, one point will be assessed against the carrier. That point will be added to any other points assessed for discovered noncompliance with acute and critical regulations of part 396 to determine the carrier's level of safety management control for that factor; and

2. If the motor carrier's vehicle OOS rate is less than 34 percent, or if there are less than three inspections, the determination of the carrier's level of safety management controls will only be based on discovered noncompliance with the acute and critical regulations of part 396.

(b) Over two million inspections occur on the roadside each year. This vehicle inspection information is retained in the MCMIS and is integral to evaluating motor carriers' ability to successfully maintain their vehicles, thus preventing them from being placed OOS during roadside inspections. Each safety audit will continue to have the requirements of part 396, Inspection, Repair, and Maintenance, reviewed as indicated by the above explanation.

B. The Accident Factor

(a) In addition to the five regulatory factors, a sixth factor is included in the process to address the accident history of the motor carrier. This factor is the recordable accident rate, which the carrier has experienced during the past 12 months. Recordable accident, as defined in 49 CFR 390.5, means an accident involving a commercial motor vehicle operating on a public road in interstate or intrastate commerce which results in a fatality; a bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or one or more

motor vehicles incurring disabling damage as a result of the accident requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) Experience has shown that urban carriers, those motor carriers operating entirely within a radius of less than 100 air miles (normally urban areas), have a higher exposure to accident situations because of their environment and normally have higher accident rates.

(c) The recordable accident rate will be used in determining the carrier's basic safety management controls in Factor 6, Accident. It will be used only when a carrier incurs two or more recordable accidents within the 12 months before the safety audit. An urban carrier (a carrier operating entirely within a radius of 100 air miles) with a recordable rate per million miles greater than 1.7 will be deemed to have inadequate basic safety management controls for the accident factor. All other carriers with a recordable accident rate per million miles greater than 1.5 will be deemed to have inadequate basic safety management controls for the accident factor. The rates are the result of roughly doubling the national average accident rate in Fiscal Years 1994, 1995, and 1996.

(d) The FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. Preventability will be determined according to the following standard: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within

his/her control which would not have risked causing another kind of mishap, the accident was preventable."

C. Factor Ratings

For Factors 1 through 5, if the combined violations of acute and or critical regulations for each factor is equal to three or more points, the carrier is determined not to have basic safety management controls for that individual factor.

If the recordable accident rate is greater than 1.7 recordable accidents per million miles for an urban carrier (1.5 for all other carriers), the carrier is determined to have inadequate basic safety management controls.

IV. Overall Determination of the Carrier's Basic Safety Management Controls

If the carrier is evaluated as having inadequate basic safety management controls in at least three separate factors, the carrier will be considered to have inadequate safety management controls in place and corrective action will be necessary in order to avoid having its provisional operating authority or provisional Certificate of Registration revoked.

For example, FMCSA evaluates a carrier finding:

(1) One instance of noncompliance with a critical

(2) Two instances of noncompliance with acute regulations in part 382 scoring three points for Factor 2;

(3) Three instances of noncompliance with critical regulations in part 396 scoring three points for Factor 4; and

(4) Three instances of noncompliance with acute regulations in parts 171 and 397 scoring four and one-half (4.5) points for Factor 5.

In this example, the carrier scored three or more points for Factors 2, 4, and 5 and FMCSA determined the carrier had inadequate basic safety management controls in at least three separate factors. FMCSA will require corrective action in order to avoid having the carrier's provisional operating authority or provisional Certificate of Registration suspended and possibly revoked.

Issued on: March 7, 2002.

Joseph M. Clapp,

Administrator.

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350 and 385

[Docket No. FMCSA-2001-11060]

RIN 2126-AA64

Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

Tuesday, March 19, 2002

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: The FMCSA is amending the Federal Motor Carrier Safety Regulations (FMCSRs) by designating the current safety fitness regulations and adding Certification of Safety Auditors, Safety Investigators, and Safety Inspectors regulations. Section 211 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) requires that a certified motor carrier safety auditor perform any safety audit or compliance review conducted after December 31, 2002. This rule establishes procedures to certify and maintain certification for auditors and investigators. In addition, it requires certification for State or local government Motor Carrier Safety Assistance Program (MCSAP) employees performing driver/vehicle roadside inspections.

DATES: This rule is effective June 17, 2002. We must receive your comments by May 20, 2002.

ADDRESSES: You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. The fax number is (202) 493-2251. Comments to the web site (http://dmses.dot.gov/submit) may be typed on-line. You must include the docket number that appears at the heading of this document in your comments. You may examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You may also review the docket on the Internet at http://dms.dot.gov. If you want notification of receipt of comments, please include a self-addressed, stamped envelope or postcard, or after submitting comments electronically, print the acknowledgement page.

FOR FURTHER INFORMATION CONTACT: Mr. William C. Hill, Office of Bus & Truck Standards and Operations, (202) 366-4001, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Room 8301, Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination using the docket number appearing at the top of this document in the docket room at the above address. The FMCSA will file comments received after the comment closing date in the docket and will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

Background

On December 9, 1999, the President signed the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106-159). Section 211 of the MCSIA requires the Secretary of Transportation to complete a rulemaking to improve training and provide for the certification of motor carrier safety auditors to conduct safety inspection audits and reviews. The legislation also gives the Secretary oversight responsibility for the motor carrier auditors and investigators it certifies, including the authority to decertify them. As enacted by Section 211(a), 49 U.S.C. 31148(b) and (c) read as follows:

(b) Certified Inspection Audit Requirement.—Not later than 1 year after completion of the Rulemaking required by subsection (a), any safety inspection audit or review required by, or based on the authority of, this chapter or chapter 5, 313, or 315 of this title and performed after December 31, 2002, shall be conducted by—

(1) A motor carrier safety auditor certified under subsection (a); or

(2) A Federal or State employee who, on the date of the enactment of this section, was qualified to perform such an audit or review.

(c) Extension.—If the Secretary determines that subsection (b) cannot be implemented within the 1-year period established by that subsection and notifies the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives of the determination and the reasons therefor, the Secretary

may extend the deadline for compliance with subsection (b) by not more than 12 months.

Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

The FMCSA is implementing Section 211 by establishing three types of certification: (1) Certification to conduct safety audits, (2) certification to conduct compliance reviews, and (3) certification to conduct roadside inspections. FMCSA or State or local government MCSAP employees qualified to perform compliance reviews on December 9, 1999, are grandfathered by 49 U.S.C. 31148(b)(2) and are not required to be certified under this rule.

The FMCSA is also grandfathering Federal, or State or local MCSAP, employees who had not been hired, or had not yet completed their normal training on December 9, 1999, but were fully trained and performing compliance reviews or roadside inspections before June 17, 2002, when we are closing the grandfather period.

We believe this complies with congressional intent, since these employees received the same kind of training as those statutorily grandfathered on December 9, 1999. Moreover, requiring these employees to repeat such training would impose unnecessary costs on their agencies and burdensome time constraints on the employees themselves, keeping them from performing their important, safety-related functions.

Grandfathered employees are treated as though they had been certified through the procedures described in this rule. As such, they are also required to maintain their virtual certification by completing the required training updates.

The FMCSA is augmenting its procedures for assessing the safety performance of motor carriers by adding a new tool, a safety audit. The agency is treating the term "safety inspection audit or review "used in Section 211 as equivalent to the "safety review" of new entrants into the motor carrier industry which is mandated by Sec. 210 of the MCSIA. The two provisions are closely related. Under Section 210, the Secretary is required to "establish the elements of the safety review," which implies that it may be something less than a full compliance review pursuant to Part 385. The safety review is to be phased in "in a manner that takes into account the availability of certified motor carrier safety auditors" (49 U.S.C. 31144(c)(3), enacted by Section 210). Section 211 contemplates the use of certified auditors to perform the "safety inspection audits and reviews" that are "required by, or based on the authority of (chapter 311) or chapter 5, 313, or 315 of" title 49, United States Code. FMCSA expects that such audits will be performed by FMCSA employees or by State inspectors. The language of section 211 authorizes non-government personnel to conduct the safety review required of new entrants. FMCSA seeks comments on the advisability of certifying non-government employees that meet all training and experience criteria to conduct safety reviews as provided in the IFR. In the interest of simplicity, the FMCSA will use the single term "safety audit" in the remainder of this document, and in a subsequent rulemaking to implement Section 210.

The term "safety audit" avoids any possible confusion with the safety reviews previously conducted by the agency, which were discontinued on September 30, 1994. A safety audit will provide educational and

technical assistance to new entrant motor carriers and gather critical safety data needed to make an assessment of these carriers' safety performance and basic safety management controls. It will only be used to review carriers identified as new entrants, i.e., those registering for a USDOT identification number.

Currently, the FMCSA relies on the compliance review, an in-depth review, to assess a carrier's safety performance and compliance with the FMCSRs and applicable hazardous materials regulations (HMRs). They are typically performed only on motor carriers with poor performance, high accident rates, high vehicle or driver out-of-service rates, past poor compliance, or those against which non-frivolous complaints have been lodged. A compliance review performed on a motor carrier's operations usually results in a determination whether the carrier meets FMCSA's safety fitness standard.

Compliance reviews are performed on shippers of hazardous materials, but do not result in a safety rating, as shippers of hazardous materials are not subject to the FMCSRs.

The compliance review also provides recommendations to assist the carrier or hazardous materials shipper to attain full compliance with the regulations. Approximately 30% of compliance reviews result in enforcement actions.

The compliance review will retain its current procedures, report format, and purpose—to evaluate a motor carrier's safety fitness—and may trigger enforcement action. The FMCSA or the State MCSAP agency will certify Federal or State personnel to conduct compliance reviews and safety audits.

All individuals who conduct safety audits, compliance reviews, or driver/vehicle roadside inspections will be required to maintain their certification by performing a specific number of safety audits, compliance reviews, or inspections annually, with acceptable quality, and by successfully completing any required training. Failing to successfully complete training, or to demonstrate proficiency in conducting audits, reviews, or inspections, requires the individual to repeat the requirements established by the FMCSA for conducting safety audits, compliance reviews, or inspections.

The FMCSA is amending the MCSAP regulations to require that each State or local government participating in MCSAP certify that its employees performing safety audits, compliance reviews, and driver/vehicle roadside inspections meet minimum Federal training, experience, and proficiency standards (see 49 CFR 350.211(17)). These standards will be posted on the FMCSA website (www.fmcsa.dot.gov). This certification process is appropriate in that participating MCSAP States and local agencies already determine if their employees are qualified based on Federal standards. It also relieves them of the potential burden of requiring State or local government employees to travel out of state to be trained or to maintain their certifications to perform compliance reviews, safety audits, or roadside inspections.

The FMCSA is not including specific training requirements in this regulation. The agency needs flexibility to modify course content quickly to match changes in the FMCSRs and HMRs, or to adapt other elements of the training process to changed circumstances. Codification would make the program inflexible and difficult to manage.

The certification requirements, however, will be posted on the FMCSA website (www.fmcsa.dot.gov) and available in hard copy at its Washington, DC, headquarters. These requirements will include the successful completion of a training course covering the FMCSRs and HMRs. Certification and maintenance requirements will be updated as necessary to reflect changes in the safety regulations. The training course will thus remain current. FMCSA will work with the States and other stakeholders as we consider and develop any amendments to the training requirements.

This interim final rule is effective on June 17, 2002. Under the fiscal year 2002 DOT Appropriations Act (Public Law 107-87; December 18, 2001), Congress directed that as a precondition to processing applications of Mexico-domiciled carriers for authority to operate beyond the commercial zone, FMCSA must issue an interim final rule on this statutory requirement. This regulation only imposes a requirement to be certified as provided for in the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106-159). Certification of Federal safety investigators and State or local government employees participating in MCSAP who perform compliance reviews or driver/vehicle roadside inspections, means that these officials have successfully completed certain training programs. These training requirements have been in effect for a number of years, and the rule imposes no new burdens on such officials. The rule also creates a new kind of review—the "safety audit"—and a corresponding certification, but the training required to be certified as a safety auditor is simply a less comprehensive version of that required to conduct compliance reviews and driver/vehicle roadside inspections. Because of Con-

gress' direction and the limited impact of the regulations, FMCSA finds that there is good cause that notice and comment are contrary to the public interest under 5 U.S.C. 553(b)(3)(B).

Rulemaking Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). It has been reviewed by the Office of Management and Budget. The subject of requirements for certification of safety auditors, investigators and inspectors will likely generate considerable public interest within the meaning of Executive Order 12866. We have classified the rule as significant because of the high level of public and congressional interest in the program.

The IFR establishes the safety certification process for persons who conduct safety audits, compliance reviews, and safety inspections. This IFR will have minimal or no economic impact. The FMCSA has developed training material and requirements for the three types of certifications to ensure uniform implementation with respect to all persons who must comply with the rule. To maintain certification, individuals must conduct a minimum number of safety activities (i.e., audits, reviews, or inspections) per year. The FMCSA may develop other specific standards regarding initial certification or maintaining certification. However, Federal and State employees who currently

conduct compliance reviews and safety inspections will not have to undergo any additional training to comply with this rule. They would only be required to meet the new standards regarding maintenance of certification. States will be required to certify that their employees meet minimal Federal standards as part of their continued participation in the Motor Carrier Safety Assistance Program (MCSAP).

Currently, Federal employees who perform compliance reviews (CRs) or roadside inspections undergo an extensive training program, such as a six-week academy training class for safety investigators and a variety of refresher courses for those performing CRs. State employees who conduct these reviews or inspections under the Motor Carrier Safety Assistance Program have training requirements that are comparable to, or as effective as, the Federal program. The agency believes that the training required for initial certification of new Federal or State employees assigned to conduct safety activities will be similar to the training that these individuals currently undergo. While there may be some additional training material developed and taught due to regulatory or program changes, it is unlikely that there will be any measurable increase in the amount of time trainees must spend in class. Any extra material would most likely be offset by reduction in the amount of time spent on topics that require less classroom instruction to master the concepts. Accordingly, we do not believe that this rule will impose any new costs on Federal or State employees who undergo training. If there are costs imposed on State agencies, those expenses are eligible expenses under the MCSAP program and as such would be paid

through the program as opposed to being paid by the States.

Although the benefits of this IFR cannot be quantified at this time, we believe this rulemaking will ensure greater uniformity and consistency in the quality of safety audits, compliance reviews, and roadside inspections, than would otherwise exist. Under the IFR, Federal or State employees will have to complete a minimum number of safety activities (safety audits, compliance reviews, roadside inspections) to maintain their certifications. This should ensure consistency in the quality of the reviews and inspections, and thereby increase the likelihood that enforcement officials identify unsafe motor carriers, drivers, and vehicles during safety activities. The ultimate result should be a reduction in crashes, injuries and fatalities. (See OMCHS Safety Program Performance Measures: Assessment of Initial Models and Plans for Second Generation Models, 1999, for an analysis of the safety impact of compliance reviews. A copy of this analysis is available in the docket described above under ADDRESSES).

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the FMCSA has considered the effects of this regulatory action on small entities. This rule is directed at certifying federal and state safety auditors, investigators, and inspectors. Federal and State employees who currently conduct compliance reviews and safety inspections will not have to undergo any additional training to comply with this rule. Therefore, we have determined that there would be minimal or no economic impact on motor carriers, including small

entities. We therefore certify that it would not have a significant impact on a substantial number of small entities.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this rule under E.O. 13045, "Protection of Children from Environmental Health Risks and Safety Risks." This rule is not economically significant and does not concern an environmental risk to health or safety that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and it has been determined that this action does not have substantial direct Federalism implications that would limit the policy-making discretion of the States. Nothing in this document directly preempts any State law or regulation. It will not impose additional costs or burdens on the States. This action will not have a significant effect

on the States' ability to execute traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FMCSA has determined that this proposal does not contain new collection of information requirements for the purpose of the PRA.

National Environmental Policy Act

The Federal Motor Carrier Safety Administration (FMCSA) is a new administration within the Department of Transportation (DOT). The FMCSA is currently developing an agency order that will comply with all statutory and regulatory policies under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). We expect the draft FMCSA Order to appear in the Federal Register for public comment in the near future. The framework of the FMCSA Order is consistent with and reflects the procedures for considering environmental impacts under DOT Order 5610.1C. The FMCSA analyzed this rule under the NEPA and DOT Order 5610.1C. We believe it would

be among the type of regulations that would be categorically excluded from any environmental assessment.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy because it sets standards for personnel who want to serve as safety auditors and has no direct relation to energy consumption. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

List of Subjects

49 CFR Part 350

Highway safety, Motor carriers, and Commercial Motor Carrier Safety Assistance Program.

49 CFR Part 385

Highway safety, Motor carriers, and Safety fitness procedures.

In consideration of the foregoing, Title 49, Code of Federal Regulations, Chapter III, part 350 is amended as set forth below:

1. The authority citation for Part 350 is revised to read as follows:

Authority: 49 U.S.C. 31100-31104, 31108, 31136, 31140-31141, 31144, 31148, 31161, 31310-31311, 31502; and 49 CFR 1.73.

2. Amend § 350.211 by adding (17).

§ 350.211 What is the format of the certification required by § 350.209?

* * * * *

(17) The State or a local recipient of MCSAP funds will certify that it meets the minimum Federal standards set forth in 49 CFR part 385, Subpart C, for training and experience of employees performing safety audits, compliance reviews, or driver/vehicle roadside inspections.

In consideration of the foregoing, Title 49, Code of Federal Regulations, Chapter III, part 385 is amended as set forth below:

PART 385—SAFETY FITNESS PROCEDURES

3. The authority citation for Part 385 is revised to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5113, 13901-13905, 31136, 31144, 31148, and 31502; Section 350 of Public Law 107- 87; and 49 CFR 1.73.

4. Amend paragraph 2 in the definition of Reviews in § 385.3 to read as follows:

§ 385.3 Definitions.

Reviews. For the purposes of this part:

* * * * *

(2) Safety Audit means an examination of a motor carrier's operations to provide educational and technical assistance on safety and the operational requirements of the FMCSRs and applicable HMRs and to gather critical safety data needed to make an assessment of the carrier's safety performance and basic safety management controls. Safety audits do not result in safety ratings.

6. Part 385 is amended by adding a new Subpart C to read as follows:

Subpart C—Certification of Safety Auditors, Safety Investigators, and Safety Inspectors

Sec.

§ 385.201 Who is qualified to perform a review of a motor carrier?

(a) An FMCSA employee, or a State or local government employee funded through MCSAP, who was qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit or roadside inspection if he or she complies with § 385.203(b).

(b) A person who was not qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit or roadside inspection after complying with the requirements of § 385.203(a).

§ 385.203 What are the requirements to obtain and maintain certification?

(a) After June 17, 2002, a person who is not qualified under § 385.201(a) may not perform a compliance review, safety audit, or roadside inspection unless he or she has been certified by FMCSA or a State or local agency applying the FMCSA standards after successfully completing classroom training and examinations on the FMCSRs and HMRs as described in detail on the FMCSA website (www.fmcsa.dot.gov). These employees must also comply with the maintenance of certification/qualification requirements of paragraph (b) of this section.

(b) Maintenance of certification/qualification. A person may not perform a compliance review, safety audit, or roadside inspection unless he or she meets the quality-control and periodic re-training requirements adopted by the FMCSA to ensure the maintenance of high standards and familiarity with amendments to the FMCSRs and HMRs. These maintenance of certification/qualification requirements are described in detail on the FMCSA website (www.fmcsa.dot.gov).

(c) The requirements of paragraphs (a) and (b) of this section for training, performance and maintenance of certification/qualification, which are described on the FMCSA website (www.fmcsa.dot.gov), are also available in hard copy from the Office of Professional Development and Training, FMCSA, 400 7th Street, SW., Washington, DC 20590.

§ 385.205 How can a person who has lost his or her certification be re-certified?

He or she must successfully complete the requirements of § 385.203(a) and (b).

Issued on: March 7, 2002.

Joseph M. Clapp,

Administrator.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 02-70986, 02-71249

PUBLIC CITIZEN, ET AL. , PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL, ET AL., PETITIONERS-INTERVENORS

v.

DEPARTMENT OF TRANSPORTATION, ET AL., RESPONDENTS

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., PETITIONERS

NATURAL RESOURCES DEFENSE COUNCIL, ET AL., PETITIONERS-INTERVENORS

v.

U.S. DEPARTMENT OF TRANSPORTATION, ET AL., RESPONDENTS

[Filed: Apr. 10, 2003]

ORDER

Before: D.W. NELSON, HAWKINS and W ARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing. Judges Hawkins and Wardlaw

have noted to deny the petition for en banc rehearing, and Judge Nelson has so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and for rehearing en banc are DENIED.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

1. Administrative Procedure Act

Section 706 of Title 5 of the United States Code provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, orotherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. National Environmental Policy Act

a. Section 4332 of Title 42 of the United States Code provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]

b. Section 1508.7 of Title 40 of the Code of Federal Regulations provides:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such

other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

c. Section 1508.8 of Title 40 of the Code of Federal Regulations provides:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

d. Section 1508.12 of Title 40 of the Code of Federal Regulations provides:

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office.

It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

e. Section 1508.25 of Title 40 of the Code of Federal Regulations provides:

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions,

have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

3. Clean Air Act

a. Section 7506(c)(1) of Title 42 of the United States Code provides:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or

instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

b. Section 93.150 of Title 40 of the Code of Federal Regulations provides:

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must make a determination that a Federal action conforms to the applicable imple-

mentation plan in accordance with the requirements of this subpart before the action is taken.

(c) Paragraph (b) of this section does not include Federal actions where:

(1) A National Environmental Policy Act (NEPA) analysis was completed as evidenced by a final environmental assessment (EA), environmental impact statement (EIS), or finding of no significant impact (FONSI) that was prepared prior to January 31, 1994; or

(2)(i) Prior to January 31, 1994, an environmental analysis was commenced or a contract was awarded to develop the specific environmental analysis;

(ii) Sufficient environmental analysis is completed by March 15, 1994 so that the Federal agency may determine that the Federal action is in conformity with the specific requirements and the purposes of the applicable SIP pursuant to the agency's affirmative obligation under section 176(c) of the Clean Air Act (Act); and

(iii) A written determination of conformity under section 176(c) of the Act has been made by the Federal agency responsible for the Federal action by March 15, 1994.

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

c. Section 93.152 of Title 40 of the Code of Federal Regulations provides in pertinent part:

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action.

* * * * *

Indirect emissions means those emissions of a criteria pollutant or its precursors that:

(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and

(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

APPENDIX E

Memorandum

Determination Under the Interstate Commerce Commission Termination Act of 1995

November 27, 2002

Memorandum for the Secretary of Transportation

Section 6 of the Bus Regulatory Reform Act of 1982, Public Law 97-261, 96 Stat. 1103, imposed a moratorium on the issuance of certificates or permits to motor carriers domiciled in, or owned or controlled by persons of, a contiguous foreign country and authorized the President to modify the moratorium. The Interstate Commerce Commission Termination Act of 1995 (ICCTA), Public Law 104-88, 109 Stat. 803, maintained these restrictions, subject to modifications made prior to the enactment of the ICCTA, and empowered the President to make further modifications to the moratorium.

Pursuant to 49 U.S.C. 13902(c)(3), I modified the moratorium on June 5, 2001, to allow motor carriers domiciled in the United States that are owned or controlled by persons of Mexico to obtain operating authority to transport international cargo by truck between points in the United States and to provide bus services between points in the United States.

The North American Free Trade Agreement (NAFTA) established a schedule for liberalizing certain restrictions on the provision of bus and truck services

by Mexican-domiciled motor carriers in the United States. Pursuant to 49 U.S.C. 13902(c)(3), I hereby determine that the following modifications to the moratorium are consistent with obligations of the United States under NAFTA and with our national transportation policy and that the moratorium shall be modified accordingly.

First, qualified motor carriers domiciled in Mexico will be allowed to obtain operating authority to transport passengers in cross-border scheduled bus services. Second, qualified motor carriers domiciled in Mexico will be allowed to obtain operating authority to provide cross-border truck services. The moratorium on the issuance of certificates or permits to Mexican-domiciled motor carriers for the provision of truck or bus services between points in the United States will remain in place. These modifications shall be effective on the date of this memorandum.

Furthermore, pursuant to 49 U.S.C. 13902(c)(5), I hereby determine that expeditious action is required to implement this modification to the moratorium. Effective on the date of this memorandum, the Department of Transportation is authorized to act on applications, submitted by motor carriers domiciled in Mexico, to obtain operating authority to provide cross-border scheduled bus services and cross-border truck services. In reviewing such applications, the Department shall continue to work closely with the Department of Justice, the Office of Homeland Security, and other relevant Federal departments, agencies, and offices in order to help ensure the security of the border and to prevent potential threats to national security.

Motor carriers domiciled in Mexico operating in the United States will be subject to the same Federal and

State laws, regulations, and procedures that apply to carriers domiciled in the United States. These include safety regulations, such as drug and alcohol testing requirements; insurance requirements; taxes and fees; and other applicable laws and regulations, including those administered by the United States Customs Service, the Immigration and Naturalization Service, the Department of Labor, and Federal and State environmental agencies.

You are authorized and directed to publish this memorandum in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

Washington, November 27, 2002.